Supreme Court, U.S.
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No. 10-118

In The

Supreme Court of the United States

DAWN GEORGETTE MYERS,

Petitioner,

v.

CENTRAL FLORIDA INVESTMENTS, INC., ET AL.

Respondents.

Cross Petition for a Writ of Certiorari to the United States Court of Appeals For The Eleventh Circuit

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CROSS PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Amendment and the rules of civil procedure require that any question absent from a verdict form be deemed resolved in accordance with the verdict, where no party sought inclusion of that question or objected to its omission before the jury retired to deliberate.

2. Whether an affirmative defense may substitute for a denial in meeting the requirement that fulfillment of a condition precedent be denied specifically and with particularity and whether a boilerplate, generic allegation can meet that requirement of specificity and particularity.

3. Whether the Seventh Amendment permits a trial court to deny a plaintiff the opportunity to cure an alleged defect in evidence raised by a defendant in a Rule 50(a) motion.

LIST OF PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed here are Cross Petitioner/Respondent Dawn Georgette Myers ("employee"), and Petitioners/Cross Respondents David Siegel; Central Florida Investments, Inc.; CFI Sales & Marketing, Ltd.; Westgate Resorts, Inc.; Westgate Resorts, Ltd.; Westgate Lakes, Inc.; and Westgate Lakes, Ltd. ("employers").

TABLE OF CONTENTS

Question Presented. i

List of Parties. ii

Table of Contents. iii

Table of Cited Authorities.. iv

Decisions Below.. vii

Statement of Jurisdiction. vii

Pertinent Statutory Provisions.. viii

Statement of the Case.. 1

Reasons for Granting the Writ. 3

I. The Verdict Is Presumed To Include All Findings Necessary To Support It.. 3

II. Pre-Verdict Failure To Object Waives Post-Verdict Challenge To Verdict Form. 5

III. Error In Allowing Statute of Limitation Question On Verdict Form. 6

IV. Error in Not Allowing Rebuttal Of Rule 50(a) Motion. . 9

Conclusion. 11

APPENDIX

APPENDIX A- Order Affirming Judgment Below, U.S. Court of Appeals for the Eleventh Circuit, January 6, 2010. . . . . 1a

APPENDIX B - Judgment on Appeal, U.S. Court of Appeals for the Eleventh Circuit, January 6, 2010. . . . . 62a

APPENDIX C - Order on Post-Trial Motions, District Court for the Middle District of Florida, October 23, 2008. . . . . 64a

APPENDIX D - Amended Judgment, U.S. District Court for the Middle District of Florida, October 23, 2008. . . . . 134a

APPENDIX E - Jury Verdict, District Court for the Middle District of Florida, February 20, 2008. . . . . 140a

APPENDIX F - Order on Petition(s) for Rehearing and Petition(s) for Rehearing En Banc, U.S. Court of Appeals for the Eleventh Circuit, April 19, 2010. . . . . 145a

TABLE OF CITED AUTHORITIES

CASES CITED **PAGE**

Ashcroft v. Iqbal,
129 S.Ct. 1937, 1953 (2009). 8

Bell Atlantic Corp. v. Twombly,
550 U.S. 544, 555 (2007). 8

Crawford v. Andrew Systems, Inc.,
39 F.3d 1151, 1153 (11th Cir. 1994). 10

E.E.O.C. v. Klingler Elec. Corp.,
636 F.2d 104, 106-7 (11th Cir. 1981). 8

Farley v. Nationwide Mutual Ins. Co.,
197 F.3d 1322, 1329 (11th Cir. 1999). 6

Fredonia Broadcasting Co., Inc. v. RCA Co.
481 F.2d 781, 796 (5th Cir. 1973). 3

In re Rawson Food Service, Inc.,
846 F.2d 1343, 1348-9 (11th Cir. 1988). 7

Johansen v. Combustion Engineering, Inc.,
170 F.3d 1320, 1330 (11th Cir. 1999). 4

Ross v. Rhodes Furniture, Inc.,
146 F.3d 1286. 1289 (11th Cir. 1998). . . . 5,10

CONSTITUTIONAL PROVISION CITED

Seventh Amendment. vii,3,5,6,

STATUTES CITED

28 U.S.C. § 1254(1). vi

Florida Civil Rights Act. 1

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*.. . . . . vii,1,8

FEDERAL RULES CITED

Fed.R.Civ.P. 9. . . . . vii,7,8

Fed.R.Civ.P. 49. . . . . viii,3,4,6

Fed.R.Civ.P. 50. . . . . viii-ix,9,10

Fed.R.Civ.P. 51. . . . . ix,4,5,

OTHER AUTHORITIES

Wright & Miller, 9B Fed. Prac. & Proc. Civ.2d § 2507. . . 4

Wright & Miller, 9C Fed. Prac. & Proc. Civ.2d § 2553. . . 6

DECISIONS BELOW

The January 6, 2010, order of the Eleventh Circuit Court of Appeals, affirming the judgment, reported at 592 F.3d 1201 (11th Cir. 2010) , is reproduced as Appendix A at 1a. The January 6, 2010, judgment on appeal in the Eleventh Circuit Court of Appeals, which is not officially reported, is reproduced as Appendix B at 62a. The October 23, 2008, Order on Post-Trial Motions in the District Court for the Middle District of Florida, is reproduced as Appendix C at 64a. The October 23, 2008, Amended Judgment, U.S. District Court for the Middle District of Florida, is reproduced as Appendix D at 134a. The February 20, 2008, Jury Verdict, District Court for the Middle District of Florida, is reproduced as Appendix E at 140a. The April 19, 2010, Order on Petition(s) for Rehearing and Petition(s) for Rehearing En Banc, U.S. Court of Appeals for the Eleventh Circuit, is reproduced as Appendix F at 145a.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals for the 11th Circuit was entered on January 6, 2010. That Court denied rehearing on April 19, 2010. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL, STATUTORY & RULE PROVISIONS

The Seventh Amendment to the Constitution of the United States is as follows:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The attorney's fee provision of Title VII of the Civil Rights Act of 1964 is codified at 42 U.S.C. § 2000e-5(k):

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs . . . .

The pertinent language of Fed.R.Civ.P. 9(c) is as follows:

> **(c) Conditions Precedent**. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent

> has occurred or been performed, a party must do so with particularity.

The pertinent language of Fed.R.Civ.P. 49(a)(3) is as follows:

> **(3) Issues Not Submitted.**
>
> A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

The pertinent language of Fed.R.Civ.P. 50(a) is as follows:

> **(1) In General.** If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
>
> > (A) resolve the issue against the party; and
> >
> > (B) grant a motion for

> judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

The pertinent language of Fed.R.Civ.P. 51(d) is as follows:

> **(d) Assigning Error; Plain Error.**
>
> **(1) Assigning Error.** A party may assign as error:
>
> > (A) an error in an instruction actually given, if that party properly objected; or
> >
> > (B) a failure to give an instruction, if that party properly requested it and — unless the court rejected the request in a definitive ruling on the record — also properly objected.

STATEMENT OF THE CASE

Cross Petitioner Myers ("employee") seeks certiorari to reverse the reduction of a jury verdict (by about $4.8 million dollars) and the denial of prevailing party fees despite a liability finding on a fee-shifting statute, all affirmed by the Court of Appeals for the Eleventh Circuit.

A jury awarded the employee $103,622.09 in compensatory damages and $5,276,640.00 in punitive damages on a count of common law battery. The jury found liability on a claim of sexual harassment under Title VII and the Florida Civil Rights Act, but awarded no damages after finding no act of harassment within the statute of limitations period. The trial judge upheld the compensatory award, but reduced the punitive award to $500,000, a Florida statutory cap on punitive damages that can apply in the absence of specific intent to harm plus actual harm. The trial court denied the employee's motions seeking prevailing party status on the sexual harassment claims and challenging the propriety of the statute of limitations question on the verdict form.

The employer appealed, seeking further reduction or elimination of the verdict. The employee cross appealed seeking restoration of the jury verdict and prevailing party status to qualify for fees under Title VII. One path to this goal was a challenge to the inclusion of the statute of limitations question on the verdict form.

A panel of the Eleventh Circuit affirmed on all

points. The employee petitioned for rehearing and rehearing *en banc*. The employer petitioned for rehearing. The court denied all petitions. The employers' early certiorari petition in this court was docketed July 6, 2010 . Case No. 10-35. This timely cross-petition follows.

For many years, David Siegel subjected Georgette Myers to a course of sexually harassing conduct, including unwanted touching, that the Eleventh Circuit panel described as "abhorrent." After six days of trial, the trial court, with input from the parties, issued a verdict form. Neither party nor the court mentioned putting anything on the verdict form seeking a finding of specific intent to harm or actual harm as to the punitive damage issue on the battery claim. Even in post-trial motions, Defendants never mentioned such an omission, nor the $500,000 state statutory cap that the court held to apply in the absence of such a finding. The reduction of punitive damages on that basis by the trial court was completely *sua sponte*.

The employee objected to the statute of limitations being on the verdict form and in the jury instructions because that is an affirmative defense on which the employer put on no evidence at trial. At the close of their case, the employers made a Rule 50(a) motion alleging that the employee had failed to give enough detail on dates to show that any incident of sexual harassment came after the limitations date. As part of her rebuttal case, the employee sought to provide additional testimony on time frames. The court sustained objections to the employee's efforts to

rebut the employer's claims because the employer had not put on any evidence about the dates, but had merely denied the occurrences.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit opinion affirmed the amount of damages the district court awarded. This petition seeks certiorari to restore the full jury verdict on the battery count and to seek prevailing party status and thus eligibility for fees on the statutory claims. As shown below, each error assigned herein amounts to a violation of the Seventh Amendment to the Constitution.

I. The Verdict Is Presumed To Include All Findings Necessary To Support It

Though no question appeared on the verdict form asking the jury to decide the presence of specific intent to harm plus actual harm, the law requires the court to presume that the jury made such a finding where the jury returned a verdict that needs such facts to be sustained. Where the verdict form is silent on an issue, Rule 49 requires that findings in accord with the judgment rendered on that issue are deemed to have been made. Fredonia Broadcasting Co., Inc. v. RCA Co. 481 F.2d 781, 796 (5th Cir. 1973) ("[U]nder Rule 49(a), Fed.R.Civ.P., as to any omitted question, it is deemed that the court made a finding on the issue omitted in

accordance with the judgment on the special verdict").[1]

Neither the trial court nor the Court of Appeals addressed the Rule 49 (or Rule 51) argument, though the employee made that the very centerpiece of her appeal. It is difficult to imagine what either court could have said to the contrary. The panel, relying on Johansen v. Combustion Engineering, Inc.,170 F.3d 1320, 1330 (11th Cir. 1999), stated that a court may, of its own volition, modify a verdict in an unlawful amount to its proper cap. But that has no application here because in this case we deal with a verdict that is not excessive *per se* such as in the situations discussed in Johansen where unlawful interest is trimmed or a court deems a verdict unconstitutionally excessive. Here the issue is the absence of findings of specific intent to harm plus actual harm. As shown above, those findings were constructively made because Rule 49 requires that such findings be deemed made. Thus they were made by the jury as far as the law is concerned, so the court's only basis for reduction never existed in the first place.

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[1]Wright & Miller, 9B Fed. Prac. & Proc. Civ.2d § 2507. ("The present rule puts the burden of securing a jury verdict on all of the meaningful issues in the case squarely on the parties. If the right to jury trial has been waived on an issue by a failure to demand its submission, the trial judge should make his or her own finding of fact on that issue. If the court does not do so, it will be presumed on appeal that the lower court made whatever finding was necessary in order to support the verdict and judgment that was entered.")(collecting cases)(footnotes omitted).

Whether a court may attack the size of the verdict on some other ground is a question not now before us, but what we do know is the law does not allow the panel's conclusion that the trial judge was permitted to reduce an "unlawful" verdict for lack of certain findings when the court was required to presume that the jury did indeed make those findings.

Moreover, as the employee showed at length in her Initial Brief in the Eleventh Circuit, Florida law, like federal law, requires waiver of the statutory punitive cap when no party timely insists upon its presence on the verdict form. The claim that exceeding the $500,000 cap on punitive damages requires express findings on the verdict form is almost surely wrong. But what is indisputably wrong is the claim that these findings can not be waived (or presumed made). That is contrary to Florida law as well as federal law.

This is an issue critical to trial practice in the courts. The ruling below encourages parties to sit silent about objections to verdict forms and spring them as an ace in the hole if the verdict comes out for the opponent. The Seventh Amendment will simply not permit a judge to dishonor a jury verdict simply because a party has saved up its objections to the verdict form to be sprung after losing. Ross v. Rhodes Furniture, Inc., 146 F.3d 1286. 1289 (11th Cir. 1998).

II. Pre-Verdict Failure To Object Waives Post-Verdict Challenge To Verdict Form

Rule 51(d) imposes waiver of any challenge to a

verdict for lack of a question on the verdict form where the challenging party failed to object to that omission before the judge sent the case to the jury. Farley v. Nationwide Mutual Ins. Co., 197 F.3d 1322, 1329 (11th Cir. 1999) ("We interpret Rule 51 strictly, and require a party to object to a jury instruction or jury verdict form prior to jury deliberations in order to preserve the issue on appeal").[2] The importance of the question is the same as that stated above for Rule 49 – parties must not be given incentive to withhold objections to verdict forms in hope of reversing losing verdicts on technicalities or persuading a judge to supplant a jury. Rule 49 deals with efforts to include something in jury instructions or verdict forms; Rule 51 deals with efforts to exclude something. The two rules often overlap, but both require the challenging party (and the judge) to speak or forever hold their peace before the jury goes out to deliberate. The rules are essential to preservation of the Seventh Amendment.

III. Error In Allowing Statute of Limitation Question On Verdict Form

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[2]Wright & Miller, 9C Fed. Prac. & Proc. Civ.2d § 2553 ("In the absence of a properly specific objection under Rule 51(c) made before the jury retires from the courtroom to begin its deliberations, a party ordinarily cannot claim on appeal that the trial court erred in the giving of an erroneous instruction in the charge, a tremendous number of cases from courts throughout the federal judicial system, many of which are cited as examples in the note below, make that abundantly clear.")(collecting cases) (footnotes omitted).

All parties and the court spoke of a "statute of limitations" throughout trial. As it became obvious in the post-trial briefing that this defense could not stand, the employers re-labeled the issue as one of "conditions precedent." The panel opinion acknowledges that Rule 9(c) requires a denial of a plaintiff's claim to have fulfilled all conditions precedent. The appellate panel also acknowledged that the employers failed in this regard because their denial is not made "specifically and with particularity," as the Rule requires. But the panel cut the employers some slack because they added an affirmative defense claiming that the employee did not timely file with EEOC.

The panel cited In re Rawson Food Service, Inc., 846 F.2d 1343, 1348-9 (11th Cir. 1988), for its explanation of the distinction between denials and affirmative defenses. That discussion shows the importance of that distinction. But the panel also cites that discussion as precedent for excusing "technical noncompliance with pleading requirements where the substance of the pleading is sufficient." But one reads and re-reads those pages without finding support for aught but the contrary conclusion. Indeed, this blurring of the difference between denials and affirmative defenses is worthy of certiorari review because it opens up vistas of concealment and diversion in pleading where a defendant wishes to sandbag an unsuspecting plaintiff into failing to meet a burden of proof by claiming that burden as the defendant's own and then shrugging it off later. The rules of civil procedure are carefully worded precisely for reasons such as these.

Second, the panel accepted the boilerplate, generic allegation that the employee was untimely in filing her EEOC charge as a statement meeting the Rule 9(c) requirement of denying "specifically and with particularity" fulfilment of conditions precedent. This assertion is routinely pasted into nearly every answer to a Title VII complaint, whether supported or not. The claim falls short of even Rule 8 pleading standards, let alone the more exacting requirements of Rule 9(c). Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Factual [averments] must be enough to raise a right to relief above the speculative level, . . . '[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right.'") (internal citation omitted) and Ashcroft v. Iqbal, 129 S.Ct. 1937, 1953 (2009) ("Our decision in Twombly expounded the pleading standard for 'all civil actions,'" not only securities actions.).

Even under earlier standards, defendants had to do more, especially under Rule 9(c). See, e.g., Equal Employment Opportunity Commission v. Klingler Elec. Corp., 636 F.2d 104, 106-7 (11th Cir. 1981) (specificity requirement was met by a detailed affidavit about the facts of the particular case). Research has not found cases in any circuit allowing the boilerplate claim of untimely EEOC filing to qualify as meeting the exacting specificity and particularity requirements of Rule 9(c). At a minimum, a claim that an EEOC charge was untimely would have to allege when the charge was filed and when it should have been filed to meet the specificity

and particularity requirements of Rule 9(c). If the decisions below stand, they will muddy the clarity of existing distinctions between denials and affirmative defenses and general denials and particular ones. It will encourage "hide-the-ball" pleading, concealment, and evasion.

Where the defendants fail both the denial prong of the test and the specificity/particularity prong, it is just too much indulgence to give them a pass on both. In doing so, the panel made new law that does not square with the pleading rules nor this Court's insistence upon taking them seriously.

IV. Error in Not Allowing Rebuttal Of Rule 50(a) Motion

The panel misapprehended the point of the employee's disallowed rebuttal testimony. The panel affirmed the trial court on this disallowance by adducing authority for the noncontroversial proposition that the trial judge has the authority, within limits, to control the scope of rebuttal testimony. The panel stated that neither side produced any evidence of timeliness in their respective cases in chief, so since there was no testimony to rebut, no rebuttal was possible because the "evidence of timeliness that the employee attempted to introduce on rebuttal, therefore, could not 'explain, repel, counteract, [n]or disprove' the testimony offered by defense witnesses." This would be all well and good if the point of the attempted rebuttal was only to counter the employers' case in chief. But after their case in chief and quite apart from it, the employers made a

Rule 50(a) motion on the issue of the timeliness of the EEOC filing. In this regard, employee was seeking to rebut something of substance, not empty air. This is an important point the panel misapprehended or overlooked. The law on this is rigidly in favor of allowing rebuttal of the Rule 50(a) motion because of the Seventh Amendment right at issue.

Before the jury retires to deliberate, a plaintiff must be allowed to cure any alleged defect in her case raised by the defendant in a Rule 50(a) motion. Ross v. Rhodes Furniture, Inc., 146 F.3d 1286. 1289 (11th Cir. 1998) (Rule 50 was designed to protect Seventh Amendment right to cure evidentiary deficiencies before case goes to the jury); Crawford v. Andrew Systems, Inc., 39 F.3d 1151, 1153 (11th Cir. 1994) (requirement that Rule 50 motion be made prior to submission of case to jury is to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a motion for judgment). In holding the contrary, the panel opinion is without precedent.

Moreover, the employee made a Rule 50(a) motion of her own on the timeliness of the EEOC filing, which, if granted, would have eliminated the limitations question from the verdict form and assured the employee her entitlement to fees when the jury returned its verdict in favor of liability on the Title VII claim.

The employee did put on some evidence showing sexual harassment clearly within the stated

limitations period. Obviously, the jury did not credit that evidence. That may be because they did not believe it, they did not remember it, they did not understand it, they did not correctly place it in time, or numerous other possibilities. But one key possibility is that there was just not enough of the evidence. The transcript shows some of what the court ordered disregarded in the rebuttal case at the time of cutting off the timeliness testimony. Trial Transcript, February 19, 2008, at 157-158. The trial court in a post-trial order noted the employee's pre-trial evidence of sexual harassment occurring in the Thanksgiving weekend, well after the limitations date of September 15, 2000. Thus the record shows much post-limitations period sexual harassment that would have been put in had the rebuttal not been interrupted.

Had the employee been allowed to add more examples of sexual harassment after September 15, 2000, to flesh out those she put on in her case in chief and those she got in during rebuttal before the court shut down the testimony, that might have been enough to persuade the jury to rule in her favor on the limitations question as well as the liability question. Perhaps even more pertinently, that additional testimony might have persuaded the judge to eliminate the limitations question from the verdict form. In either of those circumstances, the employee would now be entitled to fees.

CONCLUSION

The Court should grant the writ of certiorari

and set a briefing schedule on the issues stated herein.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-16291

D. C. Docket No. 04-01542-CV-ORL-28-DAB
[Filed January 6, 2010]

DAWN GEORGETTE MYERS,

Plaintiff-Appellee-
Cross-Appellant,

versus

CENTRAL FLORIDA INVESTMENTS, INC.,
DAVID SIEGEL, et al.,

Defendants-
Appellants-
Cross-Appellees.

Appeals from the United States District Court for the Middle District of Florida

(January 6, 2010)

Before MARCUS, FAY and ANDERSON, Circuit Judges.

MARCUS, Circuit Judge:

Defendants Central Florida Investments, Inc., Westgate Resorts, Inc., Westgate Resorts, Ltd., CFI Sales and Marketing, Ltd., and David Siegel appeal and plaintiff Dawn Georgette Myers cross-appeals the judgment of the district court, after a jury trial, in favor of Myers in the amount of $610,469.84. Myers recovered $103,622.09 in compensatory damages and $506,847.75 in punitive damages arising from her claim of state law battery, but took nothing on her claims of sexual harassment under state and federal civil rights acts. Defendants challenge the awards under state and federal law, asserting that the evidence can support neither the compensatory award nor the punitive award. Myers, in turn, asserts that the district court improperly limited punitive damages, barred evidence of harassment, denied her fees, and dismissed her state law claims. Because the district court correctly answered the many questions raised in these

appeals, we affirm its judgment in all respects.

I. Background

A. Facts

The essential facts adduced at trial are these: Central Florida Investments, Inc. ("CFI"), is the parent company for a number of associated entities – Westgate Resorts, Inc., Westgate Resorts, Ltd., Westgate Lakes, Inc., Westgate Lakes, Ltd., and CFI Sales and Marketing, Ltd. -- which collectively comprise a real estate company whose primary business is the development and sale of time-share resorts throughout the United States. Siegel is the chairman of the board, president, chief executive officer, and sole stockholder of CFI. CFI, which is the largest privately held time-share company in the world, is valued at approximately $471,000,000, while Siegel himself has a net worth of some $324,000,000.

Dawn Myers testified that she first came to work at CFI as a salesperson in 1986. She had a real estate license, and her job required her to sell time-shares. Myers was also an award-winning cosmetologist who was licensed to do hair, nails, spa treatments, and skin care. Cosmetology was her professional passion, and she hoped one day to develop a spa at one of CFI's resorts.

In 1994, Myers called the CFI corporate office in order to request an appointment with Siegel so that she could

make her pitch. Siegel, on hearing her thoughts, encouraged her to pursue the project, and, as Myers developed the concept, the two went on to communicate about it every week for about a year. Finally, Siegel authorized the creation of the spa.

During the ensuing period, Myers claims that she split her time at CFI, working in the morning in sales and working in the afternoon on the spa. She began to draw a regular salary, rather than work on straight commission. She also spent a lot of time dealing with Siegel, and the two developed a friendship. Myers would later testify, "what he told me that we had in common was the fact that we're both ambitious, we both are hard workers, [and] we both, if we believe in something, you know, we go for it."

Siegel was interested in Myers romantically, and their friendship began to change as Siegel made that increasingly clear. According to Myers, it was at the CFI Christmas dance in 1995 where Siegel made his first unwanted advance. Siegel had asked Myers to dance, and as they danced he kissed her. Myers was shocked. Siegel's overtures towards Myers continued. He twice offered, at CFI functions and in Myers' presence, $1,000,000 to Myers' boyfriend for one night with Myers. Myers considered the offers to be disrespectful and inappropriate. On several occasions, Siegel made marriage

proposals to Myers, some more serious than others, some on company property, and at least one in the presence of other CFI employees. He offered to buy Myers lavish gifts, including a Porsche, if she agreed to date him. And once, unsolicited, he even gave her a $10,000 check. Myers was devastated: "I started crying and I said, you know, how could you do this? . . . I said I don't need your help. Our friendship does not have a price tag on it. How many times do I have to tell you? I don't want your money. I don't need your help."

Siegel's pursuit of Myers also began to color their interactions in the workplace. Myers testified that he transferred her to a new office, and informed her that he had done it so that she would be closer to him. He began to visit her in the office nearly every day at 11 a.m., even asking for her if he could not find her himself. When he did find her, she testified at trial, he would give her a hug and sometimes let his hands slip down to her behind, in full view of her coworkers. Sometimes he slapped her behind at work in front of her staff. During lunches at CFI, Siegel would fondle Myers' legs for everyone to see; he touched her legs at the company restaurant at least twenty times, and probably many more. Siegel also made inappropriate comments to Myers at work. He talked about her weight, and at the company gym, he told her that "your ass is

getting fat," but that it was "okay, because [your] boobs are big." And, at a company awards dinner one night, Siegel told the CFI crowd that he had asked Myers to come as his date, but that she had refused him. She testified that the incident made her terribly embarrassed.

Myers and Siegel frequently traveled together, and these trips generally fueled the tension between them. Thus, for example, Siegel and Myers traveled together for business to the Bahamas, where, she testified, he propositioned her. Similarly, in 1997, Myers agreed to travel to New York with Siegel on business. Myers, who was first told that they would have separate hotel rooms, and who was later told that they would have separate bedrooms in the same suite, said that she grew "absolutely furious" upon discovering that their hotel room had only bedroom. She went to the bathroom and cried, but resolved nevertheless to go about her business in New York as planned. Myers also agreed to accompany Siegel -- as his friend -- to attend the bar mitzvah of the son of a CFI executive in Miami. She became "very angry," however, when Siegel invited her on a romantic walk on the beach.

On multiple occasions, Myers asked Siegel to stop his inappropriate behavior. Myers testified that, "every time I went to him and sincerely asked him, please, David, stop," he told her that he would not do it

again. "He seemed extremely sincere that he would stop, with the exception of the times that he would make a joke and say I want people to think that, you know, we're together or you're my girlfriend." Myers testified that Siegel in fact wanted people to think that they were together.

Yet Myers and Siegel continued to work closely together, and continued to be friends. Myers testified, "it never crossed my mind at that time to sever my friendship with him," because "he was my friend and he was important to me and he . . . had given me this opportunity and I was extremely grateful, extremely grateful." Myers saw Siegel as a mentor: "how many people get an opportunity to have someone like Mr. Siegel who's brilliant in business in so many ways to, you know, be their friend, to coach them, to anytime if I need to talk to him and I picked up the phone, he would take my call. I mean it meant everything to me."

Myers considered taking a harder line with Siegel, but she said that she feared losing her job: "number one, he's my boss." She thought that, because she did not have a college degree, she might flounder professionally outside of CFI. She also testified that she could not simply quit: "I have a home. . . . I had bills to pay. I was taking care of my mom. I can't just quit my job. I'm the only one that pays my bills. I

couldn't do it. And I really thought that some day it would stop."

Work on the spa continued. Construction began in 1997 or 1998, Myers was named the executive director of the spa, and she stopped working in sales in order to devote her full attention to development of the spa. She was given control over management of the facility, including design and staffing, subject to approval from the front office.

According to Myers, once the spa opened in November of 1999, it became a frequent site of Siegel's unwelcome advances. On eight to ten occasions, Siegel came to the spa looking for treatments from Myers. Towards the end of these sessions, Siegel would, Myers testified, "let his hands wander and wander up the back of my legs and on to my butt." She asked him to stop, and pushed his hands away, but he persisted. Furthermore, on several occasions, towards the end of the treatments, Siegel would expose himself unnecessarily to Myers; he would do so with "a big old smile on his face . . . , so I would think he knew he was doing it."

Several times Jackie Siegel, who was Siegel's third wife, joined Siegel and Myers in the spa. One time, while Jackie was present, Siegel told Myers that "I wanted to have the two of you together and, you know, well, at least I have the two of you together now."

Myers' said that her most public humiliation occurred at a CFI charity event in 2000. There were hundreds of employees at the event, some of whom had dressed as celebrities. At one point Myers, who was dressed as Marilyn Monroe, was summoned to the stage by Siegel, the master of ceremonies, to sing Happy Birthday. Though Myers did not want to serenade him, Siegel played to a crowd that was increasingly egging her on, and she felt that she had no choice.

Myers took the stage, where Siegel beckoned her to sit on his lap. Though nervous, and completely shocked, Myers tried "to be a good sport." She placed a napkin on his lap, intending to sit on it. She testified, "as soon as I put it on his lap, he took his hand underneath the napkin and you know, like made it go up like that." He was feigning an erection. But she sat down, sang the song -- at the end of which he kissed her -- and rushed off the stage: "I just knew I needed to get out of there. I just needed to get out of there." Her face had turned red, she felt the onset of a migraine headache, and as soon as she left the stage, she began to cry; she felt humiliated. Myers said she was "dying and mortified."

Rumors inevitably began to spread throughout CFI about Siegel and Myers. Myers claimed that rumors of a relationship between her and Siegel were ruining her reputation. "[T]here were rumors flying all

around the resort that I was having this wild affair with Mr. Siegel and no one would believe me that we were friends." Indeed, she said, there were hundreds of rumors about Siegel and Myers, and it was well-known that Siegel was in love with Myers. Myers testified that the gossip was "horrible" and "vicious," and caused her to lose friendships. She added that, during the celebrity waiter event, she could hear the crowd snickering: "the people . . . would always gossip and say such hateful, . . . mean things." This atmosphere made it difficult for Myers to go to work: "the whole company was gossiping about me. Executives were gossiping about me. Things were getting back to me that executive's wives were saying, people that didn't even know me. I didn't want to go to work." Myers testified that, ultimately, some CFI employees just thought of her as "a dumb blonde bimbo with big boobs."

When Myers began dating a new man in May of 2000, her already rocky relationship with Siegel took a turn for the worse. She testified: "His attitude just completely changed. He was angry, he was just, when you were around him he tried to just talk down to you and degrading and humiliating." He began to behave differently towards Myers: "it was very, just aggressive and mean and just demeaning and not like how it was before . . . . It was a completely different tone."

This new attitude manifested itself on several ugly occasions. Once, Siegel pinned Myers against the wall right in front of the reception desk at the spa, and in front of the three staff members who were working the desk. Myers testified, "Georgette, he said, your breasts look great in that sweater you're wearing." He had his hand on her shoulder and was leaning into her. Myers attempted to maintain her composure, signaling to Siegel with her hands to back off, and looked to be relieved once it was over. Another time, after Siegel and Jackie each had treatments, and again in the presence of spa staff, Siegel approached Myers and pinned her against a wall, suggesting that Myers "come home and lay around with" him and Jackie. He was reaching out and touching Myers. Myers told him to stop and tried to push him away. After Myers extricated herself from the situation, and while she was walking back towards her office, Siegel further commented that he wished Myers "would crawl all over" him.

In 2000, Myers brought her concerns to a number of company executives, but she said that they were of little help. She spoke with Mark Waltrip, CFI's chief operating officer, who told her that for her to date another man was "like waving a red flag in front of a bull. You know how he feels about you." She also spoke with Paul Bosch,

director of resort operations at CFI, who told her that she "should think about leaving the company." Finally, she complained to Sandy Jones, CFI's director of human resources, who once told Myers, "what are you going to do, he's the president of the company," and another time explained, "that's David." Jones was not the only one who believed that the rules did not apply to the president; Siegel himself testified that, even if there were corporate rules binding him, he could change them at his will.

Some CFI employees, including executives, either played an active role in Siegel's pursuit of Myers or were asked to. Jim Gissy, executive vice president of sales and marketing, called Myers into his office to tell her that he thought she and Siegel would be great together. Michael Marder, CFI's general counsel, told Myers at his son's bar mitzvah that he was "really glad to see that you're here with David." Siegel approached Roger Behrmann, a manager at CFI, on numerous occasions, Gail Miller, a manager in sales, and Mary Fetzner, a server at the CFI restaurant, to ask them to put in a good word for Siegel to Myers; they all complied.

Ultimately, the environment at CFI took its toll on Myers. She testified that she was "torn." On one hand, she had been "given this amazing opportunity," but on the other hand, she felt "deflated" and "didn't want to go to work." She testified that she

felt as if she were "on an emotional roller coaster all the time."

And Siegel's change in behavior only made matters worse: "I was hurt. I was sad. I didn't understand."

Myers was suspended in December of 2000, and her employment with CFI was terminated later that month. In that final year at CFI, she earned $102,223.14. On September 14, 2001, Myers filed a complaint with the Equal Employment Opportunity Commission ("EEOC").

B. Procedural History

On April 5, 2004, CFI sued Myers in the County Court of the Ninth Judicial Circuit in Orange County, Florida, seeking to recover $6,230 on the theories of a promissory note, money lent, and unjust enrichment. On May 19, 2004, Myers answered the suit and counterclaimed against CFI and Siegel, alleging disparate treatment and hostile work environment, in violation of both the Florida Civil Rights Act ("FCRA"), Fla. Stat. § 760, and Title VII of the federal Civil Rights Act, 42 U.S.C. § 2000e, et seq., abuse of process, battery, assault, conspiracy, and contractual attorney's fees.

The case was then removed to the United States District Court for the Middle District of Florida, remanded to county court, and transferred to the Circuit Court for the

Ninth Judicial Circuit. The circuit court dismissed CFI's claim for the $6,230, without prejudice, and ordered Myers to submit a new complaint. On October 1, 2004, Myers filed a new complaint. This one included the same allegations contained in the May 19 counterclaim, but added counts for slander and malicious prosecution. On October 20, 2004, the defendants removed the action to federal court in the Middle District of Florida.

On April 20, 2005, the district court dismissed some of the claims, including several of the state law claims -- abuse of process, slander, malicious prosecution, conspiracy and attorney's fees -- over which the court had declined to exercise supplemental jurisdiction. Myers amended her complaint again. The Second Amended Complaint contained nine counts. Against Siegel and CFI, Myers alleged false imprisonment and battery, common law claims in Florida, and inducement to prostitution, in violation of Florida Statute § 796.09. Against CFI alone, she alleged sex discrimination under Title VII and the FCRA, retaliation under Title VII, the FCRA, and the Florida Private Whistleblower Act ("Whistleblower Act"), Fla. Stat. § 448.101-105, and negligent retention and supervision, a common law claim. Thereafter, the district court dismissed the Whistleblower Act claim, as

well as the inducement to prostitution and negligent retention and supervision claims. The two sexual harassment claims, the two retaliation claims, the battery claim, and the false imprisonment claim remained.

On April 24, 2006, the district court granted summary judgment to CFI on the sexual harassment and retaliation claims, and remanded the two remaining state law claims to state court. But, thereafter, a per curiam panel of this Court reversed in part the grant of summary judgment, finding that Myers had presented sufficient evidence to support her Title VII and FCRA hostile work environment claims. The state law claims that had been remanded were reinstated. See Myers v. Cent. Fla. Invs., Inc., 237 F. Appx. 452 (11th Cir. 2007).

After six days of trial[1], the jury found that Siegel had "subjected the Plaintiff to a hostile or abusive work environment because of her sex or gender," but that none of the acts of sexual harassment took place on or after September 15, 2000, the point at which the statute of limitations barred

[1] The jury heard evidence on only battery and sexual harassment, as Myers had by that time withdrawn her claim for false imprisonment.

recovery.[2] The jury also found that Siegel had committed battery against Myers, and that it had occurred on or after May 21, 2000 after May 21, 2000, the relevant date under the statute of limitations.[3]

Because recovery was barred by the statute of limitations under Title VII and the FCRA, the jury did not reach the issue of damages on the sexual harassment claims. As for the battery claim, however, the jury awarded Myers $102,223.14 in compensatory damages and $5,276,640.00 in punitive damages. These damages were leveled against both Siegel and CFI. Final judgment was entered for Myers in the amount of $5,378,863.14 on the battery claim.

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[2] A litigant under the FCRA must file a complaint with the state of Florida or the EEOC within 365 days of the purported violation. Fla. Stat. § 760.11(a). Because Myers had filed a complaint with the EEOC on September 14, 2001, the defendants could only be held liable under the FCRA for sexual harassment occurring on or after September 15, 2000. Moreover, under Title VII, the EEOC complaint must be filed within 300 days of any violation, 42 U.S.C. 2000e-5(e); see also City of Hialeah, Fla. v. Rojas, 311 F.3d 1096, 1101 (11th Cir. 2002), meaning that defendants could only be liable under Title VII for conduct occurring on or after November 19, 2000.

[3] The statute of limitations for battery is four years in Florida. See Fla. Stat. § 95.11(3)(o). Myers first asserted battery in her counterclaim filed May 19, 2004.

Thereafter, the district court denied several post-trial motions; it did, however, grant the defense motion that the judgment reflect that CFI had prevailed on the sexual harassment claim. The district court also determined that the jury had not made the findings required under state law to support a punitive award greater than $500,000. Accordingly, the Amended Judgment noted that Myers "shall take nothing" on the Title VII and FCRA claims, and reflected that the district court had reduced the punitive damage award by $4,776,640. Adjusted for interest, the compensatory damages were listed as $103,622.09 and the punitive damages as $506,847.75 for a total award of $610,469.84. There was no award of attorneys' fees.

This timely appeal and cross-appeal followed.

II. Standard of Review

First, the defendants argue that Florida law cannot support a compensatory award of this size on this record. They also challenge the punitive award under state law, asserting first that punitive damages are not permitted, and, in the alternative, that the punitive damages were too great. They also maintain that the punitive damage award violates the federal Constitution.

Myers claims, in turn, first that the district court improperly applied Florida's statutory cap on punitive damages, thereby wrongfully reducing the punitive award to

$500,000 when the evidence could support greater damages. Second, she says that the defendants had the burden of showing that their unlawful behavior occurred before September 15, 2000, the relevant date under the statute of limitations. Third, she states that the district court, during rebuttal, improperly prevented her from putting on evidence that the defendants sexually harassed her on or after September 15, 2000; this evidence, she claims, would prove that her suit was timely. Fourth, she asserts that she should be considered a prevailing party under Title VII, and is therefore entitled to attorney's fees under the statute. Fifth, and finally, she argues that it was reversible error for the district court to dismiss, rather than remand a number of state law claims over which the court had declined to exercise supplemental jurisdiction.

A number of standards govern review of the questions raised in this case. We review for abuse of discretion the propriety of the compensatory award under Florida law, see Bogle v. McClure, 332 F.3d 1347, 1359 (11th Cir. 2003) (citation omitted), the district court's application of state statutory law to a jury award, Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 280 (1989); Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1334 n.28 (11th Cir. 1999); see also Engle v. Liggett Group, Inc., 945 So.2d 1246, 1263 (Fla. 2006), the district court's limitation of rebuttal, Conroy

v. Abraham Chevrolet-Tampa, Inc., 375 F.3d 1228, 1232 (11th Cir. 2004), and the district court's refusal to exercise supplemental jurisdiction over state law claims. Raney v. Allstate Ins. Co., 370 F.3d 1086, 1088-89 (11th Cir. 2004) (citation omitted).

We review for clear error, however, the district court's findings of fact, Johansen, 170 F.3d at 1334; Head v. Medford, 62 F.3d 351, 354 (11th Cir. 1995), and the district court's determination that parties have met the pleading requirements concerning the fulfillment of conditions precedent under Rule 9 of the Federal Rules of Civil Procedure. Fitz-Patrick v. Commonwealth Oil Co., 285 F.2d 726, 730 (5th Cir. 1960).[4]

Finally, we review de novo the propriety of punitive damages, Goldsmith v. Bagby, 513 F.3d 1262, 1275 (11th Cir. 2008) (citation omitted), the constitutionality of a punitive award, Johansen, 170 F.3d at 1334; see also id. at 1331 ("[A] court has a mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause.") (citation omitted), and whether a party has prevailed under federal

[4] Cases decided by the Fifth Circuit prior to the close of business on September 30, 1981, are binding on this Court. See Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1209 (11th Cir. 1981).

law. Head v. Medford, 62 F.3d 351, 354 (11th Cir. 1995).

III. Compensatory Damages

The jury awarded $102,223.14 in compensatory damages to Myers on her battery count, and the district court accordingly entered judgment for Myers in that amount. CFI and Siegel challenge this award under Florida law, asserting both that the size of the award is too great for what they claim is an ordinary battery, and that the specific amount, which is equal to Myers' earnings during the year of her discharge, demonstrates that the jury inappropriately considered her termination during deliberations. We are unpersuaded.

A federal court reviewing a compensatory award on a state law claim must evaluate the propriety of the award under state law. See Gasperini v. Ctr. For Humanities, Inc., 518 U.S. 415, 435 (1996) (citation omitted); Johansen, 170 F.3d at 1331. Under Florida law, jury awards are evaluated under a five-factor test:

> In determining whether an award is excessive or inadequate in light of the facts and circumstances presented to the trier of fact and in determining the amount, if any,

that such award exceeds a reasonable range of damages or is inadequate, the court shall consider the following criteria:

(a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact;

(b) Whether it appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amounts of damages recoverable;

(c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;

(d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered; and

(e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

Fla. Stat. § 768.74(5). Taking each factor in turn, we hold that the district court did not abuse its discretion in upholding the jury's award of compensatory damages.

The first factor asks whether the award evinces passion or prejudice. The district court cited Goldsmith v. Bagby, 513 F.3d 1262, 1275 (11th Cir. 2008), to show the validity of an emotional damages award equal to a claimant's salary. See Myers v. Cent. Fla. Invs., Inc., No. 6:04-cv-1542-Orl-28DAB, 2008 WL 4710898, at *15 n.13 (M.D. Fla. Oct. 23, 2008). But the validity of the compensatory award was not at issue in Goldsmith, see 513 F.3d at 1267-68, 1276-77, and, as the defendants argue, its relevance to our inquiry is therefore limited. Cf. Bravo v. United States, 532 F.3d 1154, 1166-67 (11th Cir. 2008) (holding that damages are to be compared only against awards tested for size in reported appellate decisions), reh'g denied, 583 F.3d 1294 (2009).

Defendants are also correct to note that the jury was prohibited from awarding Myers money for her termination. See Myers, 237 F. Appx. at 457 ("Myers cannot sustain a viable retaliation claim."). Indeed, the district court expressly gave the jury instructions to this effect. Nevertheless, CFI and Siegel have failed to convince us that the compensatory award for emotional damages equal to a claimant's annual

income evinces prejudice, passion or corruption on the part of the jury.

A jury instructed to consider compensatory damages for emotional harm is asked to place a dollar amount on one person's suffering. The inquiry is inherently subjective, see Ferrill v. Parker Group, Inc., 168 F.3d 468, 476 (11th Cir. 1999), as jurors bring their own experiences to bear on another person's humiliation, discomfort, and shame. The objective -- to make a plaintiff whole, see Sheely v. MRI Radiation Network, P.A., 505 F.3d 1173, 1199-1200 (11th Cir. 2007) -- plainly is a difficult one, cf. Williams v. Trans World Airlines, Inc., 660 F.2d 1267, 1273 (6th Cir. 1981) ("[I]t is admittedly difficult to place a value upon the resulting emotional injury from the deprivation of a constitutional right."), and the means employed are far from perfect. Cf. Consorti v. Armstrong World Indus., Inc., 72 F.3d 1003, 1009 (2d Cir. 1995) ("[C]ompensation for suffering can be accomplished only in a symbolic and arbitrary fashion."). But we will not prohibit jurors from considering a legitimate measure as they go about their task.

A plaintiff's income is relevant insofar as it affords some indication, however imprecise, of the costs imposed on an employee whose time in the workplace is inundated and spoiled by a defendant's behavior. Many of the touchings described by Myers, particularly the two incidents during

which Siegel pinned her against the wall in the spa, occurred in 2000, the year in which Myers earned $102,223.14 from CFI. She testified that Siegel's behavior during this period humiliated her in front of her coworkers and drained her of her desire to go to work. In attempting to set a dollar amount that would properly compensate her for emotional suffering, the jury was permitted to consider, among other things, her salary for the time in which she was subjected to the unlawful behavior. Her salary at the very least gives some indication to the jury as to how Myers valued her time at work, from which they may properly infer the amount of emotional suffering that flowed from those workplace batteries. To hold otherwise, and deprive juries of resort to income, would make the jury's difficult task that much more improbable.

The second statutory factor asks whether the jury ignored evidence or misconceived the merits of the case. As we have noted, the jury was permitted to conclude that several instances of battery occurred on or after May 21, 2000, the statutory cutoff. There is no reason to believe that a jury which has discounted the testimony of defense witnesses and the explanations of defense counsel has misapprehended a case. Cf. Bogle, 332 F.3d at 1359 ("The standard of review for awards of compensatory damages for intangible, emotional harm is deferential to the fact

finder because the harm is subjective and evaluating it depends considerably on the demeanor of the witnesses.") (quotation marks and citations omitted).

Florida's third statutory factor asks whether improper elements were considered, or if the verdict was based on conjecture. Defendants argue that emotional damages were never proven by medical testimony. But emotional damages need not be supported by medical testimony in Florida. See Hagan v. Coca-Cola Bottling Co., 804 So.2d 1234 (Fla. 2001). Defendants also say that no reasonable jury could award $100,000 for a single battery, and that the award, therefore, took into account incidents unrelated to the battery, including time- barred material. Even if we were to assume that the jury did consider material external to the battery itself, we conclude that the award may still stand. Under Florida law, a tortfeasor is liable for the "entire unapportionable injuries" sustained by a plaintiff, even if those injuries were heightened by prior incidents for which the defendant cannot be held liable. Cf. Gross v. Lyons, 763 So.2d 276, 279 (Fla. 2000) (noting that "subsequent tortfeasors have been liable for entire unapportionable injuries"); C.F. Hamblen, Inc. v. Owens, 172 So. 694, 696 (Fla. 1937) ("It is settled law that where injuries aggravate an existing ailment or develop a latent one the person whose negligence caused the injury is required to respond in

damages for the results of the disease as well as the original injury."). The jury was permitted to consider the role the sexual harassment and prior batteries played in heightening the damages flowing from this battery, even if that behavior was itself time-barred. Cf. Stockett v. Tolin, 791 F. Supp. 1536, 1556-57 (S.D. Fla. 1992) (stating that a plaintiff's "pre-existing" vulnerability, or "greater sensitivity, . . . does not warrant any reduction in her recovery. The Defendants must take the plaintiff as they find her") (citations omitted).

The fourth statutory factor asks whether the award is reasonably related to the damages suffered. This compensatory award of a little over $100,000 is not so great as to bear no reasonable relation to the damages she suffered. See Baldwin v. McConnell, 643 S.E.2d 703, 705-06 (Va. 2007) (approving a $100,000 compensatory award for assault and battery); Nash v. Sue Har Equities, LLC, 846 N.Y.S.2d 215, 216 (N.Y. App. Div. 2007) (awarding $100,000 for assault). Furthermore, since this battery involved a boss plainly taking advantage of his employee over an extended time frame, we can tolerate damages which may be higher than normal. Cf. Stockett v. Tolin, 791 F. Supp. 1536, 1555 n.4 (S.D. Fla. 1992) ("[C]ases in which a supervisor has conducted a continued course of sexual advances and harassment, followed by refusals by the employee, and retaliation By the

supervisor in the form of denying promotions or making the atmosphere of the work place oppressive, involved conduct that is . . . outrageous.") (quoting Fawcett v. IDS Financial Svcs., Inc., No. 85-853, 1986 WL 9877, at *5 (W.D. Pa. Jan. 7, 1986)); Hughston v. New Home Media, 552 F. Supp.2d 559, 567 (E.D. Va. 2008) ("There can be few more insulting injuries than being subjected to unwelcome sexual touchings by a supervisor, accompanied by lewd solicitations for sex, in the workplace.").

The fifth and final statutory factor asks whether the award is supported by evidence and can be logically adduced by reasonable people. For all the reasons outlined above -- the existence of the battery, the existence of prior harassment and touchings that might have heightened damage flowing from the battery, and the superior-subordinate relationship of Siegel and Myers -- this award is supported by the evidence and appears to be the result of a logical process conducted by reasonable people.

Since the compensatory award falls within a range of damages reasonable under Florida law, it does not constitute a clear abuse of discretion for the district court to let it stand. Cf. Fla. Stat. § 768.74(6) ("The Legislature recognizes that the reasonable actions of a jury are a fundamental precept of American jurisprudence and that such

actions should be disturbed or modified with caution and discretion."). Defendants are correct that a smaller award would have been reasonable, too, but this award is entitled to a presumption of validity, see Bogle, 332 F.3d at 1359, and they have failed to overcome that presumption.

IV. Punitive Damages

The jury awarded $5,276,640 to Myers in punitive damages flowing from the battery count, but the district court, relying on the Florida statutory cap on punitive damages, reduced the award to $500,000. This capped award was then adjusted for interest, resulting in the $506,847.75 award.

A. Florida Law

The defendants challenge the punitive award under Florida law, arguing that punitive damages should not have been allowed at all, and, in the alternative, that the award was excessive. Myers contends that the district court was not empowered to reduce the award absent a proper motion from defendants, which she contends was not made.

Florida law provides that:

> A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. As used in this section, the term:
>
> (a) "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

Fla. Stat. § 768.72(2). Decades of Florida case law have made it clear that a finding of battery is sufficient to trigger punitive damages. See, e.g., Canseco v. Cheeks, 939 So.2d 1122, 1123 (Fla. Dist. Ct. App. 2006) ("[I]ntentional battery supplies the requisite proof of malice, justifying a punitive damages award.") (citations omitted); see also Joab, Inc. v. Thrall, 245 So.2d 291, 293 (Fla. Dist. Ct. App. 1971) ("In Florida it is clear that an act of intentional assault and battery committed without legal justification

supplies proof of malice.").[5] Inasmuch as the Florida courts have on this issue been unequivocal, the district court did not err by allowing punitive damages here.

The district court was empowered, however, to remit the award if it determined that it was unreasonable. See id. § 768.73(1)(d). The factors the trial court is obliged to consider when assessing the excessiveness of a punitive award are the same factors it must consider when assessing the amount of a compensatory award. See id. § 768.74(5). In Florida, the courts must conduct this review in order "to make certain that the manifest weight of the evidence does not render the amount of punitive damages assessed out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct." Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1263 (Fla. 2006).

"Under Florida law, the purpose of punitive damages is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future." Owens-Corning

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[5] While the Supreme Court of Florida has never stated this rule, we may rely on the interpretation of a state's intermediate courts absent some indication from the state's highest court to the contrary. See Galindo v. ARI Mut. Ins. Co., 203 F.3d 771, 775 (11th Cir. 2000).

Fiberglas Corp. v. Ballard, 749 So. 2d 483, 486 (Fla. 1999). The Supreme Court of Florida, therefore, has determined that the wealth of the defendant is a factor for consideration in determining the reasonableness of a punitive award: "an award must be reviewed to ensure that it bears some relationship to the defendant's ability to pay and does not result in economic castigation or bankruptcy of the defendant." Engle, 945 So. 2d at 1263; see also Rinaldi v. Aaron, 314 So. 2d 762, 764 (Fla 1975); St. John v. Coisman, 799 So. 2d 1110, 1115 (Fla. Dist. Ct. App. 2001). While it is not "an accurate rule of law that the greater a defendant's wealth, the greater must be punitive damages," Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530, 533 (Fla. 1985), a "jury may properly punish each wrongdoer by exacting from his pocketbook a sum of money which, according to his financial ability, will hurt, but not bankrupt." Bould v. Touchette, 349 So. 2d 1181, 1186-87 (Fla. 1977).

This punitive award of $500,000 does not offend Florida Statute § 768.74(5). Given the many years during which Siegel touched and harassed Myers in the workplace, his repeated and public humiliations of her, and his refusal to desist despite her repeated requests, the award can hardly be said to evince passion, prejudice, or corruption. The award does not reveal that the court ignored

evidence or considered improper elements, nor is the award otherwise illogical. Simply stated, the trial court could find that the $500,000 punitive award bore a reasonable relation to the damage that would flow from a battery preceded by so much sexual misconduct in the workplace.

Furthermore, the punitive damage award would not result in the economic castigation or bankruptcy of the defendants. The district court heard testimony that CFI's net worth exceeded $471,000,000 and Siegel's $324,000,000. Since defendants' ability to pay the original $5,378,863.14 judgment is, by their own post trial admission, plain, the amended $500,000 punitive award cannot be said to bear an unreasonable relationship to their ability to pay.

Under Florida law, punitive damages also are subject to a statutory cap, and Myers asserts that it was improperly applied here. Section 768.73(1)(a) of the Florida Statutes provides that "an award of punitive damages may not exceed the greater of: 1. Three times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or 2. The sum of $500,000." But there are statutory exceptions to this general rule, one of which provides that, "[w]here the fact finder determines that at the time of injury the defendant had a specific intent to harm the

claimant and determines that the defendant's conduct did in fact harm the claimant, there shall be no cap on punitive damages." Id. § 768.73(1)(c). In other words, in order for a punitive award greater than $500,000 to stand, a Florida jury must have found both specific intent to harm and actual harm.

There is no question that the jury did not make any such overt findings. The jury answered eight questions on the verdict form, none [6] of which addressed specific

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[6] The interrogatories answered by the jury were these:

Claim One Do you find from a preponderance of the evidence:

1. That Plaintiff Georgette Myers was an independent contractor? No . . .

2. That Plaintiff Georgette Myers was an employee of any of the following business entities? . . .

Central Florida Investments, Inc. Yes

CFI Sales and Marketing, Ltd. Yes

Westgate Resorts, Inc. Yes

Westgate Resorts, Ltd. Yes

3. That David Siegel subjected the Plaintiff to a hostile or abusive work environment because of her sex or gender? Yes . . .

4. That at least one of the acts of sexual harassment took place on or after

September 15, 2000? No . . .

Claim Two

7. Do you find from a preponderance of the evidence that Defendant David Siegel committed battery against Plaintiff? Yes . . .

intent to harm or actual harm. However, the inquiry does not end there. The jury verdict is considered alongside the jury instructions, and if the two can be read together to show that the jury made the required findings, then a heightened award may still stand. Cf. McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1072 (11th Cir. 1996) (stating that the sufficiency of jury instructions should be evaluated in light of the jury verdict).

The district court's instructions to the jury regarding battery read this way:

> A battery is an intentional infliction of harmful or offensive contact upon the person of another. To prevail on her battery claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

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8. Do you find from a preponderance of the evidence that conduct constituting battery occurred on or after May 21, 2000? Yes . . .

9. Do you find from a preponderance of the evidence that Plaintiff should be awarded compensatory damages on the battery claim? Yes. If Yes, in what

amount? $102,223.14 . . .

10. Do you find by clear and convincing evidence that punitive damages should be awarded on the

> First: That David Siegel intended to touch the Plaintiff's person;
>
> Second: That David Siegel actually touched the Plaintiff against her will; and
>
> Third: That the contact was harmful or offensive to the Plaintiff.

There is no natural reading of the verdict alongside the instructions that yields the conclusion that the jury made the requisite findings. As the instructions make clear, a civil battery might be supported where a defendant had specific intent to offend, not harm, and where the defendant effected an offensive, but not harmful, contact. See Paul v. Holbrook, 696 So. 2d 1311, 1312 (Fla. Dist. Ct. App. 1997). Therefore, it can hardly be said that the findings of specific intent to harm and actual harm inhere in a jury verdict of civil battery.

The district court did make passing reference to the twin requirements when issuing instructions on punitive damages,

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battery claim? Yes. If Yes, in what amount, based on a preponderance of the evidence? $5,276,640.00 . . .
The jury did not reach questions five and six, which concerned damages for sexual harassment, because it answered question four in the negative.

encouraging the jury to "consider . . . whether, at the time of the injury or damage, David Siegel had a specific intent to harm the Plaintiff and the conduct of David Siegel did in fact harm the Plaintiff." Yet the court never instructed the jury that it must find specific intent to harm or actual harm.

Furthermore, the district court was entitled to apply the statutory cap of its own volition: "where a portion of a verdict is for an identifiable amount that is not permitted by law, the court may simply modify the jury's verdict to that extent and enter judgment for the correct amount." Johansen, 170 F.3d at 1330 (citing New York, L. E. & W. R. Co. v. Estill, 147 U.S. 591 (1893)); see also Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279 (1989). Because the Florida statute does not require a motion by the aggrieved party, see Fla. Stat. §768.73(1)(a), we need not consider whether the defendants properly moved for application of the statutory cap.

B. Constitutional Law

The defendants also challenge the constitutionality of the $500,000 punitive award, asserting that they did not have fair notice that they might be liable to pay a punitive award so much greater than the compensatory award.

The foundation of the due process inquiry is found in B.M.W. of North America, Inc. v. Gore, 517 U.S. 559 (1996).

"Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." Id. at 574. While "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition," id. at 568 (citations omitted), and states "have considerable flexibility in determining the level of punitive damages that they will allow," id., an award runs afoul of the due process clause when it "can fairly be categorized as 'grossly excessive' in relation to these interests," id. (quoting TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 454 (1993)). To help determine when an award is grossly excessive, the Supreme Court has adopted three guideposts for a court's consideration: "the degree of reprehensibility" of the defendant's actions; "the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." Id. at 574-75.

Proper due process analysis of a punitive award in the Eleventh Circuit "requires first that we identify the state's interest in deterring the relevant conduct and the strength of that interest. Next, we review the district court's findings regarding

the three BMW guideposts." Johansen, 170 F.3d at 1335. While we are "mindful of the difficulty of our task," id. at 1333 n.22 (citing Gore, 517 U.S. at 606 (Scalia, J., dissenting)), we are guided by the understanding that the constitutional question ultimately hinges on whether a defendant "had adequate notice that its conduct might subject it to this punitive damage award." Id. at 1335; see also Action Marine, Inc. v. Cont'l Carbon, Inc., 481 F.3d 1302, 1318 (11th Cir. 2007) ("We do not view these guideposts as an analytical straitjacket, and we maintain as our overarching aim eliminating the risk that a defendant is punished arbitrarily or without fair notice of the possible consequences of its actions.") (quotation marks and citations omitted).

The state's interest in deterring defendants' conduct is strong. As the Supreme Court of Florida has stated:

> There can be no doubt at this point in time that both the state of Florida and the federal government have committed themselves strongly to outlawing and eliminating sexual discrimination in the workplace, including the related evil of sexual harassment. The statutes, case law, and administrative regulations uniformly and without exception condemn sexual harassment in the strongest possible terms.

Byrd v. Richardson-Greenshields Secs., Inc., 552 So. 2d 1099, 1102 (Fla. 1989). Furthermore, the state's interest in protecting workers from sexual discrimination extends to both statutory and common law claims: "Public policy now requires that employers be held accountable in tort for the sexually harassing environments they permit to exist, whether the tort claim is premised on a remedial statute or on the common law." Id. at 1104.

There is no question that Florida has a considerable interest in protecting workers from the kind of sexual misconduct to which Myers was subjected for so many years. The jury found a battery by a superior on an employee in the workplace. This battery followed a long period during which Siegel and CFI subjected Myers to sexual harassment, but for which recovery was barred by the statute of limitations. Furthermore, Myers' repeated complaints, both to Siegel and other CFI executives, were ignored and rebuffed. This unchecked pattern of "antisocial behavior" from Siegel and CFI underscores the need for punitive damages as a means "to correct evil-doing in areas not covered by the criminal law." See Campbell v. Gov't Employees Ins. Co., 306 So. 2d 525, 531 (Fla. 1974).

With awareness of the powerful state interests in play, we turn next to the Gore guideposts. The first is the degree of reprehensibility, and it is "the most

important indicium." State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003); see also Goldsmith, 513 F.3d at 1283 (calling the first prong the "dominant consideration"). The Supreme Court, in State Farm, identified five specific factors for consideration:

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

538 U.S. at 419; see also Goldsmith, 513 F.3d at 1283 (citing EEOC v. W&O, Inc., 213 F.3d 600, 614-15 (11th Cir. 2000)). While there is no requirement that a certain number of the five State Farm factors be present in order to support a finding of reprehensibility, reprehensibility grows more likely as more factors are present. See State Farm, 538 U.S. at 419.

The district court took each State Farm factor in turn. On the first factor, the court noted that "the harm here was emotional rather than economic." Myers,

2008 WL 4710898 at *17. As the jury heard evidence that Myers felt upset, embarrassed, humiliated, and degraded by Siegel's actions at CFI, this finding of fact does not constitute clear error.

On the second factor, the district court noted that "there is some disregard of health at play insofar as Plaintiff's emotional health was involved." Id. Since there was plenty of evidence here, concerning both the battery and the sexual harassment, suggesting an indifference or reckless disregard towards Myers' health, whether physical or emotional, it was not clear error for the district court to so find.

On the third factor, the district court found that the employment relationship mattered: "financial vulnerability is implicated somewhat because, although this battery claim did not involve financial consequences for Plaintiff per se, the events did occur in the workplace and Plaintiff's boss -- who controlled Plaintiff's earnings -- was the one who committed the acts." Id. Myers presented evidence that she feared making too big a deal of the touchings and harassment because Siegel was her boss and she did not want to lose her job. She testified that she stayed at CFI in part because she needed the money, and because she knew that her chosen industry would not be as kind to a person without a college degree as had been CFI. The district court's determination, therefore, that the

superiorsubordinate relationship between Siegel and Myers injected a sense of financial vulnerability into their interactions cannot constitute clear error. Cf. Stockett v. Tolin, 791 F. Supp. 1536, 1555 n.4 (S.D. Fla. 1992); Hughston v. New Home Media, 552 F. Supp.2d 559, 567 (E.D. Va. 2008).

On the fourth factor, the district court wrote, "there is some evidence of repeated actions, though only a six-month time period is at issue." Myers, 2008 WL 4710898 at *17. We note, however, that a jury may consider material external to the charge in determining the reprehensibility of the charge itself. See Gore, 517 U.S. at 576-77 ("Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law.") (citing TXO, 509 U.S. at 462 n.28); State Farm, 538 U.S. at 423 (noting the relevance to the reprehensibility inquiry of similar "prior transgressions") (citing TXO, 509 U.S. at 462 n.28); Johansen, 170 F.3d at 1333 (similar). Moreover, "evidence of other acts need not be identical to have relevance in the calculation of punitive damages." State Farm, 538 U.S. at 423-24.

In this case, there was voluminous evidence of repetition presented to the jury. Myers described a pattern of sexual touching from Siegel beginning in 1995 and ending in

2000. He touched her in the office, in the restaurant, in the spa, in the treatment room, and on the dance floor. He touched her legs, her behind, and her shoulders. He touched her when they were alone and when other CFI employees were around. While these touchings were not all identical, it did not constitute clear error for the district court to determine that the battery for which defendants were held liable "replicate[d] the prior transgressions." Cf. id. at 423 (citing TXO, 509 U.S. at 462 n.28). The district court's only error was the suggestion that the similar prior transgressions that are time-barred are in no way relevant to the reprehensibility inquiry; such a conclusion does not flow from our precedents. See Gore, 517 U.S. at 576-77; State Farm, 538 U.S. at 423 (citing TXO, 509 U.S. at 462 n.28); Johansen, 170 F.3d at 1333.

On the fifth and final factor, the district court noted that "battery is an intentional tort, although malice is not required for its commission." Myers, 2008 WL 4710898 at *17. Inasmuch as battery in Florida can be sustained by an intent to do mere offense, see Paul v. Holbrook, 696 So. 2d 1311, 1312 (Fla. Dist. Ct. App. 1997), the district court's determination that intentional malice was not present is not clearly erroneous.

After the analysis of the State Farm factors, the district court turned to Gore and concluded that "Mr. Siegel's conduct is at the

low to middle range of the reprehensibility scale." Id. This is a factual finding, see Johansen, 170 F.3d at 1334, for which the district court is allowed in its discretion to weigh the severity of each factor, see State Farm, 538 U.S. at 419. In light of the ample evidence that Myers suffered emotional distress, that she decided to stomach the objectionable conduct for fear of losing her job and her income, that the behavior persisted for years and over her frequent objections, and that no one at CFI seemed to care, we cannot say that the district court's conclusion regarding reprehensibility is clearly erroneous.

The second Gore guidepost is the ratio of punitive damages to actual harm inflicted on the plaintiff. The "proper inquiry is whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred." Gore, 517 U.S. at 581 (citing TXO, 509 U.S. at 460) (emphasis in original) (quotation marks omitted). On this issue, "comparison between the compensatory award and the punitive award is significant." Id. at 581 (citing TXO, 509 U.S. at 459; Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991)). In particular, the ratio of punitive to compensatory damages is instructive. See State Farm, 538 U.S. at 425. Nevertheless, the Supreme Court has "consistently rejected the notion that the

constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award." Gore, 517 U.S. at 582 (citing TXO, 509 U.S. at 458); see also State Farm, 538 U.S. at 425; Goldsmith, 513 F.3d at 1283.

In this case, the amended judgment set punitive damages at $506,847.78 and compensatory damages at $103,622.09. Since this yields a ratio of punitive to compensatory damages of approximately 4.89:1, the district court's finding that the ratio was "less than 5 to 1," Myers, 2008 WL 4710898 at *17, is not clearly erroneous. Cf. Johansen, 170 F.3d at 1334 ("[T]he ratio of the actual to the punitive damages is an historical fact. We accept that finding unless it is clearly erroneous."). The district court then concluded that "[t]his ratio does not suggest an excessive award." Myers, 2008 WL 4710898 at *17.

Notably, this Court has approved of a number of punitive awards where the ratio of punitive to compensatory damages exceeded 4.89:1. See Johansen, 170 F.3d at 1327, 1339 (ratio of 100:1); Goldsmith, 513 F.3d at 1283, 1285 (ratio of 9.2:1); U.S. EEOC v. W&O, Inc., 213 F.3d 600, 616-17 (11th Cir. 2000) (ratio of8.3:1); Action Marine, Inc. v. Cont'l Carbon, Inc., 481 F.3d 1302, 1321, 1323 (11th Cir. 2007) (ratio of 5.5:1); see also Bogle v. McClure, 332 F.3d 1347, 1362 (11th Cir. 2003) (ratio of 3.8:1). Furthermore, on the one occasion where this Court has struck

down a punitive award for constitutional excess, it reduced an award with a ratio of 8,692:1 to an award with a ratio of 2,173:1. See Kemp v. Am. Tel. & Tel. Co., 393 F.3d 1354, 1365 (11th Cir. 2004) (reducing the punitive award from $1,000,000 to $250,000 when compensatory damages amounted to $115.05). Those cases, like this one, implicated powerful state interests, from protection of the environment, see Johansen, 170 F.3d at 1339; Action Marine, 481 F.3d at 1319, to the elimination of workplace discrimination, see Goldsmith, 513 F.3d at 1267; EEOC v. W&O, 213 F.3d at 607; Bogle, 332 F.3d at 1350, to the protection of consumers, see Kemp, 393 F.3d at 1357.

Again, the state interest in protecting employees from repeated offensive sexual touchings by the boss in the workplace is strong. Furthermore, the $506,847.75 punitive award bears a reasonable relationship both to the harm Myers has suffered and to the harm likely to result should CFI not be penalized now. The district court, therefore, did not err in determining that the punitive ratio of 4.89:1 does not offend constitutional due process.

Defendants urge, nevertheless, that under Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008), any ratio greater than 1:1 is constitutionally suspect. Their reliance on Exxon is misplaced. In Exxon, the Supreme Court was quite explicit that it was dealing with

maritime law, and not due process of law. See, e.g., id. at 2626 ("Today's enquiry differs from due process review because the case arises under federal maritime jurisdiction, and we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process . . . ."); id. at 2626-27 ("Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute."). Defendants' suggestion that the punitive award violates the Constitution of the United States can therefore find no support in Exxon.

The third and final Gore guidepost is a comparison between "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." 517 U.S. at 583. When considering criminal penalties, a reviewing court considers both fines and imprisonment. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991); see also Gore, 517 U.S. at 583 (citing Haslip, 499 U.S. at 23). These peripheral sanctions are significant because they can serve to give fair notice to potential tortfeasors of the magnitude of sanctions they might face for their actions. See Gore, 517 U.S. at 584; Johansen, 170 F.3d at 1337.

The third guidepost presents a mixed question of law and fact:

> [T]he selection of the most appropriate point of comparison – actual fine imposed, the maximum possible penalty or penalties in similar cases -- is an issue of law. We, therefore, review the district court's determination of the appropriate comparison de novo. However, the district court's finding regarding this comparison, i.e., the disparity between the amount of the punitive damages award and the amount of the other civil or criminal sanctions, is an historical fact which we review for clear error.

Johansen, 170 F.3d at 1334.

The district court determined that Florida's statutory cap on punitive damages was the most appropriate comparison point. See Myers, 2008 WL 4710898 at *18. This was error. The fact that some torts can be punished up to $500,000 does not put people on notice that battery might be punished up to $500,000. Rather, the district court should have compared the punitive award to the

sanctions available for a criminal battery.[7]

However, even after determining that the district court applied the wrong comparison point, we still ultimately affirm its conclusion. We do so because the proper comparison point did provide unambiguous notice to the defendants of the seriousness of their tort. Battery is a crime in Florida punishable by up to a year in prison, see Fla. Stat. §§ 784.03(1), 775.082(4)(a), 775.083(1)(d), which is a serious criminal sanction. The due process clause is violated when[8] defendants do not have fair notice of the magnitude of the punitive sanctions they might face. Because battery can carry a prison term of a year, residents of Florida have fair notice that battery is an offense with formidable consequences. A $500,000 punitive award fits comfortably within this array of potential sanctions.

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[7] Under Florida law, the criminal "offense of battery occurs when a person: 1. Actually and intentionally touches or strikes another person against the will of the other; or 2. Intentionally causes bodily harm to another person." Fla. Stat. § 784.03(1)(a).

[8] As Myers argues, Siegel, with a net worth of $324,000,000, would likely pay $500,000 to avoid a year in prison.

As a final matter, under controlling case law, the courts of this Circuit are empowered to consider the financial resources of the defendant when determining the constitutionality of an award. See Johansen, 170 F.3d at 1338; W&O, 213 F.3d at 616-17 (similar); Kemp, 393 F.3d at 1364. Undeniably, the $500,000 punitive award is a serious sanction and may not be taken lightly. It will not, however, bankrupt or cripple these wealthy defendants. Moreover, the trial judge could readily find that a lesser award would not provide the same level of deterrence.

We can discern nothing to suggest that the punitive award in this case is in any way violative of the Constitution. Siegel engaged in a pattern of offensive sexual touchings in the workplace, heaping upon Myers, his subordinate, indignities both private and public. CFI, alerted to Siegel's abhorrent behavior on numerous occasions by Myers, did nothing to stop it, and even in some instances encouraged it. It can hardly be said that the defendants did not have fair notice that years of such behavior -- culminating in the battery for which they were found liable -- might expose them to a substantial punitive damages award. The jury and the district court, after hearing extended testimony, plainly meant for the defendants to understand that their conduct towards Myers was wholly unacceptable and that it would be punished in a substantial

manner. Ultimately, the Constitution permits the district court to fashion a punitive remedy that will effectively deliver this message.

V. Statute of Limitations

Because Myers filed her complaint with the EEOC on September 14, 2001, the defendants could only be held liable for sexual harassment that had occurred on or after September 15, 2000, under the FCRA, see Fla. Stat. § 760.11(a), and on or after November 19, 2000, under Title VII. See 42 U.S.C. 2000e-5(e); City of Hialeah, Fla. v. Rojas, 311 F.3d 1096, 1101 (11th Cir. 2002). Nevertheless, Myers presented little testimony during her case-in-chief concerning when the complained-of behavior occurred. While her witnesses described much harassing conduct, they did not state clearly when it had occurred, or if any had occurred after September 15, 2000. Nor did the defendants put on evidence regarding when the events described by Myers' witnesses purportedly occurred. When, during rebuttal, Myers attempted to develop testimony that would show that some harassment had indeed occurred after September 15, 2000, the district court did not allow it. Myers argues, nevertheless, that her failure to put on evidence of timeliness

should not preclude her from recovery under Title VII and the FCRA, because it was the defendants who bore the burden of proving that their conduct occurred before the relevant dates, and because they failed to discharge that burden.

The filing of a complaint with the EEOC is a condition precedent to a sexual harassment suit. See Wilkerson v. Grinnell Corp., 270 F.3d 1314, 1317 (11th Cir. 2001); see also 42 U.S.C. § 2000e-5(b). A harassment suit may go forward under some circumstances, however, if the plaintiff has failed to do so, because "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." Zipes v. Trans World Airlines,Inc., 455 U.S. 385, 393 (1982); see also Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1521 (11th Cir. 1991).

"In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity." Fed. R. Civ. P. 9(c). Should a defendant make that denial, "[t]he plaintiff then bears the burden of proving that the conditions precedent, which the defendant has specifically joined in issue, have been satisfied." Jackson v. Seaboard Coast Line R.R. Co., 678 F.2d 992, 1010

(11th Cir. 1982). Should a defendant "not deny the satisfaction of the conditions precedent specifically and with particularity, however, the allegations are assumed admitted and cannot later be attacked." Id. at 1009.

In this case, the ninth paragraph of Myers' Second Amended Complaint addressed conditions precedent. It read: "Plaintiff received her Notice of Right to Sue letter from the U.S. Equal Employment Opportunity Commission within 90 days before filing this action, and has otherwise fulfilled all conditions precedent to institution of this action." This general statement from Myers was sufficient to discharge her duty under Rule 9 of the Federal Rules of Civil Procedure. See EEOC v. Times-Picayune Publ'g Corp., 500 F.2d 392, 392 (5th Cir. 1974).[9] We consider, then, the sufficiency of any denials interposed by the defendants.

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[9] Opinions of the Fifth Circuit rendered before the close of business on September 30, 1981, are binding on this Court. See Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1209 (11th Cir. 1981).

Defendants' first denial consisted of the following: "Defendants deny the allegations contained in paragraph 9 of the Plaintiff's Second Amended Complaint." Defendants' Answer and Affirmative Defenses to Plaintiff's Second Amended Complaint at 2, Myers v. Cent. Fla. Invs., Inc., No. 6:04-cv-1542-Orl- 28DAB (M.D. Fla. Oct. 25, 3005). This is as general as a denial can be, and therefore cannot meet the particularity requirements of Rule 9 of the Federal Rules. See, e.g., Wilshin v. Allstate Ins. Co., 212 F.Supp.2d 1360, 1370 (M.D. Ga. 2002).

However, paragraph nine was not the only place in the Answer where defendants addressed the fulfillment of conditions precedent. In a section concerning affirmative defenses appeared the following:

> 338. Plaintiff failed to exhaust all administrative remedies and thus cannot obtain relief pursuant to Title VII or the Florida Civil Rights Act, Chapter 760.
>
> 339. Plaintiff did not exercise her right to sue or to file her EEOC Complaint within the time prescribed by the statute.

Defendants' Answer and Affirmative Defenses to Plaintiff's Second Amended Complaint at 32, Myers, No. 6:04-cv-1542-

Orl-28DAB (M.D. Fla. Oct. 25, 3005). These paragraphs state which particular condition precedent they claim Myers failed to fulfill (the EEOC complaint), and the reason for the failure (untimeliness). The denial is sufficiently particular.

While affirmative defenses are, of course, distinct from denials, see, e.g., In re Rawson Food Service, Inc., 846 F.2d 1343, 1349 (11th Cir. 1988), and while Rule 9(c) calls for a denial, this Court has excused technical noncompliance with pleading requirements where the substance of the pleading is sufficient. See id. at 1348-49 n.9; EEOC v. Klingler Elec. Corp., 636 F.2d 104, 107 (5th Cir. 1981). Here, the Answer gave Myers ample notice that defendants believed that she had failed to timely file a complaint with the EEOC. This notice served to discharge defendants' duty under Rule 9(c) and successfully shifted the burden of going forward back to Myers to present evidence of timeliness. This she did not do.

Moreover, the district court did not abuse its considerable discretion in preventing Myers from putting on evidence of timeliness during rebuttal. "The trial judge has the authority, within limits, to control the scope of rebuttal testimony." United States v. Renfro, 620 F.2d 497, 502 (5th Cir. 1980) (citing Geders v. United States, 425 U.S. 80, 86 (1976)). Here, Myers offered no evidence of timeliness during her case-in-chief, and the defendants did not

mount evidence on the issue during their case. The evidence of timeliness that Myers attempted to introduce on rebuttal, therefore, could not "explain, repel, counteract, [n]or disprove" the testimony offered by defense witnesses, cf. United States v. Mock, 523 F.3d 1299, 1303 (11th Cir. 2008) (quoting United States v. Frazier, 387 F.3d 1244, 1269 (11th Cir. 2004) (en banc)); there was no evidence to rebut.

VI. Prevailing Party Status

While under Florida law, attorney's fees were not available to Myers on the state law battery count, see United Svcs. Auto. Ass'n v. Kiibler, 364 So. 2d 57, 58 (Fla. Dist. Ct. App. 1978), Title VII provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . ." 42 U.S.C. § 2000e- 5(k); see also Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 414 (1978).

Determining when a party prevails is a complex question:

> If the plaintiff has succeeded on any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit, the plaintiff has crossed the threshold to a fee award of some kind . . . The touchstone of the prevailing party

> inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.

In Walker v. Anderson Elec. Connectors, 944 F.2d 841, 846 (11th Cir. 1991) (quoting Tex. Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 791-93 (1989)) (alterations in original) (quotation marks omitted). The "moral satisfaction" that accompanies a judicial determination that one has been aggrieved is insufficient to establish prevailing party status. See Walker, 944 F.2d at 847 (quoting Hewitt v. Helms, 482 U.S. 755, 762 (1987)). Rather, the prevailing party must have settled "some dispute which affects the behavior of the defendant towards the plaintiff," Farrar v. Hobby, 506 U.S. 103, 110 (1992) (quoting Hewitt, 482 U.S. at 761) (quotation marks omitted), and the judgment must be "enforceable," id. at 111. Ultimately, "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Id. at 111-12; see also Taylor v. Sterrett, 640 F.2d 663, 669 (5th Cir. 1981) ("[T]he proper focus is whether the plaintiff has been successful on the central issue as exhibited by the fact

that he has acquired the primary relief sought.").

In Walker v. Anderson Electrical Connectors, 944 F.2d 841 (11th Cir. 1991), the plaintiff alleged a violation of Title VII and two accompanying violations of state tort law, namely invasion of privacy and outrage. See id. at 842. The jury determined that the defendant had sexually harassed the plaintiff, and committed the state torts, but awarded nothing in damages on either claim. See id. at 843. The jury found that the harassment had not resulted in damages. See id. We determined that Walker was not a prevailing party under Title VII, "hold[ing] that to be a prevailing party for purposes of 42 U.S.C. § 2000e-5(k), requires the attainment of something more tangible than a jury finding of sexual harassment." Id. at 847. Yet this broad holding does not reach this case, where Myers did attain something more tangible than a jury finding of sexual harassment -- namely, a $610,469.84 award on her battery claim.

The Second Circuit, however, has encountered a case that is squarely on point. In Bonner v. Guccione, 178 F.3d 581 (2d Cir. 1999), the plaintiff asserted, among other things, sexual harassment claims under Title VII and the New York Human Rights Law. The jury found that the plaintiff had been sexually harassed, that damage had occurred within the applicable state time-frame, but that none had occurred during the applicable

federal time-frame. Id. at 583. She therefore recovered $90,000 on the state claim, but nothing on the federal claim. Id. The court determined ultimately that the plaintiff was not a prevailing party under Title VII, reasoning that there was simply nothing to enforce: "Plaintiff here failed to obtain either an enforceable judgment or settlement agreement against the defendants on her Title VII cause of action." Id. at 594.

The analysis of the Second Circuit is persuasive. The jury's determination that CFI and Siegel subjected Myers to sexual harassment, but that recovery was time-barred, does nothing to advance the legal rights asserted by Myers against the defendants. Based on the judgment rendered, the defendants need not curtail their behavior nor pay Myers money, cf. Farrar, 506 U.S. at 111-12, and the legal relationship between the parties has not been altered. Cf. Walker, 944 F.2d at 846.

Moreover, on the Title VII count, judgment was even entered in favor of the defendants. Cf. Bonner, 178 F.3d at 599 ("[T]he jury found that the Title VII claim for damages (the only relief sought) was time-barred. If the jury had returned a special verdict containing such an express finding, the defendants would have been entitled to the entry of a judgment in their favor."). In short, Myers is not a prevailing party on the

Title VII claim and is not entitled to attorney's fees.[10]

VII. Reinstatement of Other State Law Claims

As a final matter, Myers asks us to instruct the district court to reinstate a variety of state law claims that were dismissed in April of 2005. While we agree that federal district courts in removal cases must remand, rather than dismiss, state claims over which they decline to exercise supplemental jurisdiction, see Cook v. Sheriff of Monroe County, 402 F.3d 1092, 1123 (11th Cir. 2005); Lewis v. City of St. Petersburg, 260 F.3d 1260, 1267 (11th Cir. 2001), Myers neglected to raise this issue when this case first came before this Court. Nearly five

[10] Victory on the battery charge played no causal role in the decision of the district court not to award attorney's fees on the Title VII charge. If, however, the trial court had declined to award fees under Title VII on account of an award of fees on a related matter, our analysis would be different. Cf. Bridges v. Eastman Kodak Co., 102 F.3d 56, 58 (2d Cir. 1996); Hall v. W. Prod. Co., 988 F.2d 1050 (10th Cir. 1993).

years have passed since these claims were dismissed, and we decline now to upset the decision of a lower court that should have been challenged before us more than two and a half years ago. Cf. Nationalist Movement v. City of Cumming, Ga., 92 F.3d 1135, 1138-39 (11th Cir. 1996); Caban-Wheeler v. Elsea, 71 F.3d 837, 842 (11th Cir.1996); Martin v. Atlantic Coast Line R.R. Co., 289 F.2d 414, 416 (5th Cir. 1961).

Accordingly, the judgment of the district court is AFFIRMED.

AFFIRMED.

APPENDIX B

United States Court of Appeals
For the Eleventh Circuit

No. 08-16291

District Court Docket No.
04-01542-CV-ORL-28-DAB

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
[Filed Jan 6, 2010]
THOMAS K. KAHN
CLERK

DAWN GEORGETTE MYERS,
Plaintiff-Appellee
Cross-Appellant,

versus

CENTRAL FLORIDA INVESTMENTS, INC.,
DAVID SIEGEL, et al.,

Defendants-Appellants
Cross-Appellees,

Appeals from the United States District Court
for the Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: January 6, 2010
For the Court: John P. Ley, Acting Clerk
By: Patch, Jeffrey

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAWN GEORGETTE MYERS,
Plaintiff,
-vs-
Case No. 6:04-cv-1542-Orl-28DAB

CENTRAL FLORIDA INVESTMENTS, INC., CFI SALES AND MARKETING, LTD., WESTGATE RESORTS, INC., WESTGATE RESORTS, LTD., and DAVID SIEGEL,
Defendants.

[Filed October 23, 2008]

ORDER

Plaintiff's claims of sexual harassment under the Florida Civil Rights Act ("FCRA") and Title VII of the Civil Rights Act of 1964, as well as her claim of battery under Florida law, were tried to a jury over a six-day period in February 2008. On the sexual harassment claims, the jury returned a verdict finding that Plaintiff had been subjected to

harassment but that none of the acts of sexual harassment occurred on or after September 15, 2000—within the 365 days prior to the filing of her administrative charge, as required for her claims to be timely under the administrative scheme. Because of this finding of untimeliness, the jury did not reach the issue of damages on the sexual harassment claims.

On the battery claim, the jury returned a verdict for Plaintiff, finding that Defendant David Siegel did commit battery against Plaintiff and that conduct constituting battery occurred on or after May 21, 2000—within the four years prior to the filing of the battery claim and thus within Florida's four-year statute of limitations for such a claim. The jury awarded compensatory damages of $102,223.14 on the battery claim, as well as $5,276,640.00 in punitive damages. Judgment for Plaintiff was entered in these amounts on February 29, 2008. (Doc. 241).

Pursuant to Federal Rule of Civil Procedure 62(b) and agreement of the parties, enforcement of the judgment and of the bill of costs has been stayed, without bond, until ten days after disposition of the parties' post-trial motions.[1] (Order, Doc. 264).

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[1]In light of Plaintiff's agreement not to require a bond (see Doc. 249) and the entry of the Order (Doc. 264) staying the judgment until after disposition of

These post-trial motions, which are numerous, are now before the Court for disposition.

I. Motions Filed by Plaintiff

A. Plaintiff's Renewed Motion for Judgment as a Matter of Law (Doc. 257).

Plaintiff's Renewed Motion for Judgment as a Matter of Law Pursuant to Rule 50 on Statute of Limitations (Doc. 257) pertains to Plaintiff's sexual harassment (hostile work environment) claims under Title VII and the FCRA. The jury found that Plaintiff was subjected to a hostile or abusive work environment but that none of the acts of sexual harassment took place on or after September 15, 2000—within 365 days before the filing of her EEOC charge—barring relief on these statutory claims.

Plaintiff argues that the timeliness issue, which she describes as a "statute of limitations," was an affirmative defense on

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post-trial motions, Defendants' Unopposed Motion to Seal (Doc. 245) documents containing financial information was rendered moot and will be denied as such in this Order. Plaintiff's latest motion pertaining to the requirement of a bond (Doc. 285) will be denied without prejudice in light of the other rulings in this Order, rendering Defendants' second Unopposed Motion to Seal (Doc. 286) moot.

which Defendants bore the burden of proof. She contends that the Court erred in instructing the jury as to the timeliness issue after allegedly precluding her from addressing the issue in her rebuttal case. She requests that "the affirmative defense of the statute of limitations" be stricken; that the jury's finding of this defense be nullified; that she be awarded nominal damages based on the jury's finding of liability on the hostile environment claim; and that she be found to be entitled to attorney's fees under Title VII and the FCRA. Defendants maintain that the timeliness issue is a condition precedent on which Plaintiff bore the burden and that Defendants were not obligated to present any evidence as to timeliness when Plaintiff did not establish timeliness in her case-in-chief.

Plaintiff's contentions in this motion are without merit. Plaintiff is incorrect in characterizing the timing of the hostile work environment events as a "statute of limitations issue"; she was not precluded from presenting evidence regarding the timing of events; and the question of when the events at issue occurred was plainly one of fact for the jury's resolution.

The timeliness of the sexual harassment claims is not a true "statute of limitations" issue on a which Defendants bore the burden of proof. In Zipes v. Trans World Airlines, Inc.,455 U.S. 385, 393 (1982),

the Supreme Court held "that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." The Supreme Court later stated in that opinion that the legislative history of Title VII "indicates that Congress intended the filing period to operate as a statute of limitations instead of a jurisdictional requirement." Id. at 394. However, the Supreme Court did so not in the context of allocating burdens of proof but rather in determining whether the untimeliness of a claim would deprive a court of jurisdiction over the claim.

It is clear that in this circuit, the plaintiff bears the burden of proof on the issue of timely administrative filing, a condition precedent to suit. In Jackson v. Seaboard Coast Line Railroad Co., 678 F.2d 992 (11th Cir. 1982), the Eleventh Circuit Court of Appeals explained, in discussing Title VII's presuit requirements, that pursuant to Federal Rule of Civil Procedure 9(c), a plaintiff must allege in his complaint that he has fulfilled all conditions precedent, and if the defendant disagrees, the defendant may deny such satisfaction of preconditions. Id. at 1010. If the defendant does so, "[t]he plaintiff then bears the burden of proving that the conditions precedent, which the defendant has specifically joined in issue,

have been satisfied." Id.; see also Mahgoub v. Miami Dade Cmty. Coll., No. 05-11520, 2006 WL 952278, at *1 (11th Cir. Apr. 13, 2006) ("Plaintiff has not carried his burden of showing that at least one incident occurred within 300 days of his 29 April 2003 EEOC filing."); Rizo v. Ala. Dep't of Human Res., 228 F. App'x 832, 836 (11th Cir. 2007) ("Generally, the plaintiff must allege in the complaint filed in his lawsuit that he has met the prerequisites o[f] a valid and timely-filed EEOC charge. If the defendant denies that the plaintiff ha[s] met those requirements, the burden of proof is on the plaintiff to prove that he has.") (citation omitted). But see Salas v. Wisc. Dep't of Corr., 493 F.3d 913, 922 (7th Cir. 2007) (holding that "[a] plaintiff's failure to exhaust administrative remedies is an affirmative defense, which is the defendant's burden to prove").

In this case, Defendants alleged failure to timely file at their first opportunity and maintained that position throughout the case, through trial, plainly putting timely filing at issue and placing the burden on Plaintiff. Plaintiff pled fulfillment of conditions precendent (see Second Am. Compl. Doc. 47 ¶9), and Defendants responded that "Plaintiff did not exercise her right to sue or to file her RROC Complaint within the time prescribed by the statute" (Defs.' Answer & Affirmative Defenses to

Pl.'s Second Am. Compl., Doc. 85, at 32). Defendants then filed a motion to dismiss (Doc. 54) and untimeliness was among their arguments; that motion was denied because Plaintiff had alleged that some events occurred as late as Thanksgiving 2000. (See Docs. 63 & 76). Defendants raised the issue again in their summary judgment motion (Doc.93), but because there was evidence presented at the summary judgment stage depicting events occurring around Thanksgiving 2000, which had to be accepted as true for summary judgment purposes; that motion also was denied with regard to this issue (Order, Doc. 143, at 29).

The issue of the timeliness of the filing of Plaintiff's administrative charge was plainly a factual matter for the jury, as was the question of whether Plaintiff's state law battery claim was timely under Florida's four-year statute of limitations—a "true" statute-of-limitations issue on which Defendants bore the burden of proof. [2] See,

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[2] The timeliness issues regarding the sexual harassment claims and the battery claim were at times argued simultaneously by counsel, resulting in some confusion and overlap of the labels "statute of limitations" and "condition precedent." It is clear, however, that the jury found for Defendants on the issue (timely administrative filing) on which Plaintiff

e.g., Ramos v. Philip Morris Cos., 743 So. 2d 24, 30 (Fla. 3d DCA 1999) ("[T]he statute of limitations is an affirmative defense which must be plead and proved by the defendant."). The jury resolved the latter issue in Plaintiff's favor, and Plaintiff has not raised a post-trial challenge to the submission of the battery statute-of-limitations issue to the jury.

This case involved vastly disparate testimony from the parties' witnesses—a classic "he said, she said" case where the jury was compelled to choose which side it found credible. The questioning of the witnesses throughout the trial pertained to what happened (or did not happen) and when. After Plaintiff rested her case-in-chief, Defendants made an *ore tenus* Rule 50 motion on the issue of whether any of the events described by Plaintiff occurred within the 300 days[3] prior to the filing of her administrative charge. (Trial Tr. Feb. 14,

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bore the burden of proof and for Plaintiff on the issue (battery within the statute of limitations) on which Defendants bore the burden of proof.

[3] Later, Defendants agreed that the operative time period is 365 days rather than 300 days. (See Trial Tr. Feb. 20, 2008, Doc. 243, at 8 & 12). During most of the trial, however, Defendants argued (outside the presence of the jury) for a 300-day limitation. (See, e.g., Trial Tr. Feb. 14, 2008, Doc. 240, at 60-61, 64).

2008, Doc. 240, at 59-66). The Court reserved ruling on the motion (id. at 66), and the trial continued with the Defendants' presentation of their case. After the Defendants rested, Plaintiff made a "partial Rule 50 motion," in part with regard to this issue as to timeliness. (Trial Tr. Feb. 19, 2008, Doc. 242, at 133). Plaintiff argued that "[t]he defense has rested without raising anything in support of its affirmative defense of a lack of activity within the statute of limitations time period." (Id. at 133-34). Plaintiff continued that "the defendant pled the statute of limitations, but they rested their case before they put on the first thing to shift the burden back to the plaintiff on that issue." (Id. at 134). Plaintiff argued that she had "put on evidence of incidents well up into the period, and . . . that [the Defendants] have not met their burden to even properly raise it for consideration." (Id. at 135).

Defendants responded by arguing that it was plaintiff's burden of proof as to when the act(s) supporting her battery claim occurred and as to whether she had "instituted the administrative process [i]n a timely fashion" with regard to her Title VII claim. (Id. at 138). Defendants argued that Plaintiff was improperly trying to put the burden on Defendants to "prove a negative" because it was Defendants' theory that none of the events of harassment occurred at any time. (Id. at 139). Defendants further argued

that Plaintiff had not presented any evidence as to events happening within the requisite time period toward the end of her employment. (Id. at 139-40). Defendant, still relying on a 300-day period instead of a 365-day period at this point in the trial, again asserted that Plaintiff had to show events happening in November or December 2000 in order for the Title VII claim to be timely. (Id. at 142). Defendants also argued that in any event they had shown untimeliness through Mr. Siegel's testimony. (Id. at 143). The Court reserved ruling on the "statute of limitations argument." (Id. at 152).

Plaintiff then began her rebuttal case, with Plaintiff testifying once again. (Id. at 152-53). Plaintiff's counsel questioned Plaintiff about when the events that another witness, Kelly Oehrle, had testified about had occurred. (Id. at 157). After defense counsel made an objection that was sustained on hearsay grounds, Plaintiff testified without objection that the first incident that Ms. Oehrle witnessed occurred "a couple of months after [Ms. Oehrle] had already worked there, and the second time was right before she left" in October or November 2000. (Id. at 157-158).[4] The rest of

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[4] Immediately after this testimony, the following exchange occurred:

Q. She saw an incident in July and an incident in November, December, correct?

Plaintiff's "rebuttal testimony" pertained to other issues. (See id. at 159-64).

During the charge conference held at the conclusion of the trial testimony, the parties again sparred over whether the issue with regard to the timeliness of both the battery claim and the sexual harassment claims should be submitted to the jury. (Trial Tr. Feb. 20, 2008, Doc. 243, at 5-12).

A. Yes, sir.

Mr. Mitnik [defense counsel]: Leading.

The Court: Sustained.

Mr. Mitnik: Move to strike.

The Court: Ladies and gentlemen, disregard the last question and answer.

Q. When did she see the incidents?

Mr. Mitnik: Objection. May we approach?

The Court: First, the objection is sustained. This is an opportunity to put on rebuttal testimony and asking a witness when another person happened to see something isn't rebuttal.

Mr. Johnson [Plaintiff's counsel]: Okay. What about when did it happen, this event that he denied?

The Court: It's to rebut the testimony of somebody else, it's not to redo your case in chief.

Mr. Johnson: Well, doesn't it make it more credible to be able to place it in more detail in time and place than previously?

The Court: Well, but that may be helpful in the case in chief, but in rebuttal you're pretty much limited to just having pure rebuttal testimony. That's the purpose of it. It's not to rehash what was done in the case in chief. So just try to stick with rebuttal.

(END OF BENCH CONFERENCE.)

(Id. at 158-59).

Plaintiff's counsel asserted that he "wanted to tighten up the statute of limitations problem in rebuttal" but "was not allowed to because it wasn't responsive to anything that happened in the defense." (Id. at 6). Plaintiff's counsel also asserted that he has "never seen that in a jury instruction." (Id.).

The Court included the issue of timing in the jury instructions as to both the battery claim and the sexual harassment claims, and the verdict form asked the jury whether events constituting battery and sexual harassment occurred on or after the respective pertinent dates for these claims. (See Jury Instructions, Doc. 232, at 15-16 & 21-22; Verdict, Doc. 233, at 2-3).

The assertion by Plaintiff's counsel that such issues are never included in jury instructions is not well-founded. Where there is an issue as to whether an act occurred at a certain time so as to render a claim timely under an administrative scheme or a statute of limitations, the issue is one of fact for a jury, and courts instruct juries accordingly. See, e.g., Weaver v. African Methodist Episcopal Church, 54 S.W.3d 575, 587 (Mo. Ct. App. 2001) (holding that "the issue of whether the battery occurred more than two years before the date of filing was one of fact for resolution by the jury" under the circumstances of the case); see also, e.g., Fla. Std. Jury Instructions in Civil Cases 3.8(g) & Verdict Form 8.9 (including special

interrogatory for jury to determine statute-of-limitations compliance in medical malpractice cases).

In sum, the issue of whether events occurred in late 2000 that would render the filing of Plaintiff's administrative charge timely was manifestly a factual one for the jury to resolve. Accordingly, the Court did not grant either side's Rule 50 motion during trial and submitted the issues of timeliness as to both battery and sexual harassment to the jury. The Court did not preclude anyone from presenting evidence pertaining to the time that events occurred, and abundant evidence was presented regarding when things happened or did not happen. Plaintiff is not entitled to judgment as a matter of law on this issue, and her motion (Doc. 257) is thus denied.

B. Plaintiff's Motion for Remand of Certain State Claims (Doc. 280)

In this motion, Plaintiff seeks remand of some of her state law claims to the Florida circuit court from which this case was removed. These claims, set forth in Plaintiff's First Amended Complaint (Doc. 17), alleged: abuse of process (Count I); slander (Count VIII); malicious prosecution (Count IX); conspiracy (Count X); and contractual attorney's fees (Count XI). On April 20, 2005, this Court, in ruling on Defendants' motions to dismiss (Docs. 22-24), declined to exercise

supplemental jurisdiction over these state law claims because they were unrelated to Plaintiff's employment discrimination claims and there was a risk that they would predominate. (See Order, Doc. 46). The Court dismissed these five state law claims. (See id. at 7). Plaintiff was then given leave to amend her complaint; she filed her Second Amended Complaint (Doc. 47) one week later, and the case proceeded with regard to the counts set forth in the Second Amended Complaint.

Plaintiff now seeks to revive the five dismissed state law claims, arguing that the Court should have *remanded* them to state court in April 2005 instead of *dismissing* them. However, the case authority Plaintiff cites does not support this argument. Moreover, Plaintiff has waited far too long in seeking this relief. Plaintiff did not bring this alleged error to the Court's attention in April 2005 when it occurred, nor did Plaintiff seek this relief after entry of the first judgment in this case (Doc. 144) in April 2006.

Somewhat astoundingly, Plaintiff now contends that "[n]o appeal has yet been docketed in this case" (See Doc. 280 at 2), attempting to invoke Federal Rule of Civil Procedure 60(a)'s "before an appeal has been docketed" time limit for motions to correct "clerical mistakes." However, judgment in favor of Defendants was first entered in April 2006 pursuant to the granting of

Defendants' summary judgment motion, and Plaintiff's then remaining state law claims for battery and false imprisonment were remanded to state court at that time. (See Docs. 143 & 144). In May 2006, Plaintiff sought reconsideration of the summary judgment ruling but did not raise any issue about the 2004 state law claim dismissals. (See Doc. 146). Plaintiff then appealed the April 2006 judgment (See Doc. 161), and in August 2007 the Eleventh Circuit Court of Appeals issued its mandate affirming in part, reversing in part, and remanding the case to this Court for further proceedings. (See Doc. 170). Pursuant to that mandate, the case proceeded to trial in February 2008 on Plaintiff's claims of battery and sexual harassment[5]—the trial that precipitated the instant flurry of post-trial motions. Plaintiff cannot now challenge as error the April 2004 dismissal of her other state law claims. Indeed, the Court doubts it even has the power to "remand" claims that it dismissed

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[5] During the pretrial conference on January 31, 2008, the parties agreed that the false imprisonment and battery claims were properly before this Court for trial despite having been remanded to state court in April 2006 and that the only claims for trial were the sexual harassment claims and the battery claim. Plaintiff voluntarily dismissed her false imprisonment claim prior to trial. (See Doc. 216).

more than three years ago. Plaintiff's motion for remand of these claims is denied.

C. Plaintiff's Motion to Establish Entitlement to Fees (Doc. 258)

Shortly after the jury returned its verdicts, Plaintiff moved, with consent of Defendants, for bifurcation of the issues of entitlement to attorney's fees and amount of attorney's fees, noting that under Rule 4.18 of the Local Rules of this Court, a motion as to both issues usually must be filed within fourteen days of entry of judgment. (See Doc.244). The magistrate judge granted the motion to bifurcate (judge granted the motion to bifurcate (See Order, Doc. 248), and Plaintiff has since filed her Motion to Establish Entitlement to Fees under Title VII and Florida Civil Rights Act (Doc. 258).

In this motion, Plaintiff claims entitlement to prevailing-party attorney's fees under Title VII and the FCRA. Title VII's attorney's fee provision states that "[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party. . . a reasonable attorney's fee (including expert fees) as part of the costs." 42 U.S.C. §2000e-5(k).[6] Plaintiff

[6] The FCRA's attorney's fee provision states: "In any action or proceeding under this subsection, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. It is the intent of the Legislature that this provision for

claims that she is a "prevailing party" if her Rule 50 motion is granted and that she also is a "prevailing party" if her Rule 50 motion is not granted. The Court has already, within this Order, denied Plaintiff's Rule 50 motion, so the only potential basis for fees is that Plaintiff is a "prevailing party" under Title VII even with that motion having been denied.

Plaintiff begins this portion of her argument by acknowledging that "[t]he verdict in the instant case presents some issues in determining whether Plaintiff is a prevailing party." (Doc. 258 at 5). Plaintiff asserts that she "won liability on the statutory claims but was barred from winning damages by the statute of limitations finding." Id. She nevertheless claims "prevailing party" status. The Court disagrees.

In Walker v. Anderson Electrical Contractors, 944 F.2d 841 (11th Cir. 1991), the Eleventh Circuit noted the "prevailing party" standard established by the Supreme Court: "'If the plaintiff has succeeded on "any significant issue in litigation which

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attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action." § 760.11(5), Fla. Stat. Thus, the analysis in the text of the issue of entitlement to fees under Title VII applies equally to the matter of entitlement to fees under the FCRA.

achieve[d] some of the benefit the parties sought in bringing suit," the plaintiff has crossed the threshold to a fee award of some kind . . . . The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.'" Id. at 846 (quoting Tex. Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 791-93 (1989) (alterations in original). The jury in Walker found that the plaintiff was sexually harassed but that she sustained no monetary damages as a result. The appellate court affirmed the district court's denial of fees, holding that a jury's finding of sexual harassment, "without more, will not ordain a litigant the prevailing party" because such a finding does not alter the legal relationship between the parties as required by the Garland standard. Id. at 847. The court explained that the plaintiff's "only claim to the spoils of victory is a jury finding of sexual harassment. 'That is not the stuff of which legal victories are made.' Therefore, . . . we hold that to be a prevailing party for purposes of 42 U.S.C. §2000e-5(k)[] requires the attainment of something more tangible than a jury finding of sexual harassment." Id. (quoting Hewitt v. Helms, 482 U.S. 755, 762 (1987)).

In the instant case, Plaintiff's potential claim to an entitlement to

"prevailing party" status is even weaker than in Walker. Presumably, the Walker plaintiff had established a claim of sexual harassment within the time period required for an actionable Title VII claim; Plaintiff here did not do so. The jury found that Plaintiff had been subjected to harassment but not within the period required to have rendered her claim timely. The jury's finding that no acts of harassment occurred within the required time frame is not merely a technicality; it is a bar to relief, whether in the form of damages or attorney's fees. See Bonner v. Guccione, 178 F.3d 581, 583, 594 (2d Cir. 1999) (concluding, in case where plaintiff "was not awarded damages on her Title VII hostile work environment sexual harassment claim because she failed to establish that she sustained any damage within the period of her employment that was not time-barred," that the plaintiff was not entitled to fees under Title VII because she "failed to obtain either an enforceable judgment or settlement agreement against the defendants on her Title VII cause of action," as "[t]he jury's liability finding on the Title VII cause of action entitled plaintiff to none of these—there was simply nothing to 'enforce'").

Here, the jury did not even reach the question of damages; having found no event occurring within the requisite time period, it would have been improper for the jury to

have made any damage award. If this case had been more straightforward as to timely filing—that is, if there had not been a factual issue involved and the Court had been able to rule on the matter of timeliness prior to trial—surely Plaintiff would not be the "prevailing party." The result is no different where a jury finds as a matter of fact that the claim was not brought within the timeline required by the administrative scheme. An untimely claim is an untimely claim, whether determined to be so by a judge or by a jury; a party cannot "prevail" on such a claim.

Plaintiff also asserts that she is entitled to fees because she obtained a monetary recovery on her state law battery claim, a claim which she alleges "shares a common nucleus of operative fact" with the Title VII claim. Plaintiff contends that "the successful battery claims all sound in sexual harassment and would be in the same time frame." (Doc. 258 at 10). This argument is not well-taken.

Courts have sometimes allowed fees where a plaintiff prevails only on state law claims, but those cases are distinguishable from this one. For example, in Skokos v.Rhoades, 440 F.3d 957, 962 (8th Cir. 2006), the court explained, citing the legislative history of 42 U.S.C. § 1988, that "where a federal court grants relief on a state-law claim to avoid a constitutional issue, it may

award attorney's fees if the constitutional claim was 'substantial' and both the constitutional and the state-law claims arose out of a 'common nucleus of operative fact.'" However, in this case relief was not granted on a state-law claim to avoid a constitutional issue; there is no constitutional issue involved here at all. Instead, the jury made a factual determination that none of the events underlying the sexual harassment claim occurred within the requisite time frame. See Bonner, 178 F.3d at 595 (finding that plaintiff was not entitled to "prevailing party" attorney's fees under Title VII even though she prevailed on state law sexual harassment claim, stating that the argument that the "fortuitous circumstances" of her federal and state claims being tried together "entitle her to prevailing party status is akin to the equation of 0 + 0 = 1" and "would award plaintiff hundreds of thousands of dollars on a time-barred Title VII claim, thus nullifying the 'value judgment [made by Congress] concerning the point at which the interests in favor of protecting valid claims are outweighed by the interest in prohibiting the prosecution of stale ones'" (quoting Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 463-64 (1975)) (alteration in original).

Plaintiff relies on Bridges v. Eastman Kodak Co., 102 F.3d 56 (2d Cir. 1996), and Hall v. Western Production Co., 988 F.2d

1050 (10th Cir. 1993), but they are easily distinguished. In Bridges, the three plaintiffs' Title VII sexual harassment claims were tried to the court at the same time their state law sexual harassment claims were tried to a jury. The jury awarded backpay and compensatory damages on the state law claims, but the jury then subtracted all of the backpay of one of the plaintiffs because that plaintiff had not mitigated her damages. The court echoed the jury's findings but declined to award additional damages under Title VII because to do so would have resulted in duplicative awards. The Second Circuit affirmed the district court's finding that all three plaintiffs were "prevailing parties"—even the one whose backpay had been negated by failure to mitigate. The only reason that plaintiff had not been awarded compensatory damages on her Title VII claim, however, was that she had already been awarded such damages on her parallel state law claim. Such is not the situation here.

Hall is distinguishable for the same reason. There, the plaintiff brought a federal claim under the Age Discrimination in Employment Act ("ADEA") and a state law claim for breach of contract. Both claims were tried to a jury. The jury found age discrimination but that the plaintiff had sustained no damages on that claim, and it further found for plaintiff on the breach of

contract claim, awarding $41,793 in damages. The court then awarded attorney's fees to the plaintiff as the "prevailing party" under the ADEA. The appellate court affirmed the award, noting that the jury had been specifically instructed that it could find for plaintiff on both of his claims but it could not award duplicative damages. In the instant case, by contrast, the reason the jury did not award damages to Plaintiff on the Title VII claim was not because of a "duplicative damages" issue but because the jury never reached the question of damages due to its finding that no timely event occurred.

Plaintiff was not the "prevailing party" on her Title VII or FCRA claims. Her request for a declaration of entitlement to attorney's fees under those statutes is therefore denied.

II. Motions Filed by Defendants

A. Defendants' Motion for Remittitur (Doc. 252); Defendants' Motion for New Trial (Doc. 253); and Defendants' Renewed Motion for Judgment as a Matter of Law (Doc. 254)

Pursuant to Federal Rule of Civil Procedure 50(b),[7] Defendants have moved for

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[7] Plaintiff argues in her opposition memorandum that the Court may not grant relief on Defendants' Rule 50(b) motion because the motion "addresses completely different subject matter than the Rule

judgment as a matter of law, arguing: that "[t]he record does not support the jury's finding that Siegel committed a battery upon" Plaintiff; that "[t]he record does not support the jury's conclusion that compensable damages were directly and proximately caused by the purported battery"; that "[t]he record does not support the compensatory damages awarded by the jury"; that "[t]he record does not support a finding, by clear and convincing evidence, that punitive damages were warranted"; and that "[t]he amount of punitive damages far exceeds anything that the record supports." (Doc. 254 at 2). Defendants have also, under Rule 59, moved for a new trial (Doc. 253) on the bases that the damages awards are excessive; that the battery verdict is against the clear weight of the evidence, and that juror concealment tainted the verdict. Also

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50(a) motion made at trial." (Doc. 270 at 1). Plaintiff contends that Defendants moved for judgment as a matter of law at trial only on the sexual harassment claims and not with regard to the battery claim. (See id.). Plaintiff is mistaken. Defendants clearly moved for judgment as a matter of law on the battery claim in a timely fashion. (See Trial. Tr. Feb. 19, 2008, Doc. 242, at 140); see also Fed. R. Civ. P. 50(a)(2) ("A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury."). The Court finds all Rule 50 issues properly preserved by Defendants.

under Rule 59, Defendants seek remittitur of the damages awards. (Doc. 252).

1. Standards for Rule 50 and Rule 59 Motions

Judgment as a matter of law "is appropriate when a plaintiff presents no legally sufficient evidentiary basis for a reasonable jury to find for him on a material element of his cause of action." Christopher v. Florida, 449 F.3d 1360, 1364 (11th Cir. 2006). "But if there is substantial conflict in the evidence, such that 'reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions, the motion must be denied.'" Id. (quoting Walker v. NationsBank of Fla. N.A., 53 F.3d 1548, 1555 (11th Cir. 1995)). As a California district court explained when addressing motions under Rules 50 and 59:

> Judgment as a matter of law following a jury verdict is proper if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's. Judgment as a matter of law is improper if there is

> substantial evidence to support the jury's verdict. "Substantial evidence" is admissible evidence that reasonable minds might accept as adequate to support a conclusion. In considering a motion under Rule 50, the court does not assess the credibility of witnesses, and does not weigh the evidence, but [instead] draws all factual inferences in favor of the nonmoving party. Finally, the court may not substitute its judgment of the facts for the judgment of the jury.
>
> Similarly, the Court has discretion to grant a new trial under Rule 59 if the verdict appears . . . to be against the weight of the evidence. A new trial is warranted where the verdict is contrary to the clear weight of the evidence and the verdict results in the miscarriage of justice.

Westerfield v. Wade, No. CV 05-6645 ABC (CWx), 2008 WL 1931240, at *1 (C.D. Cal. Apr. 9, 2008) (citations and internal quotations omitted) (alterations in original). "On a Rule 59 motion, a district court may

set aside the jury's verdict and grant a new trial only if '(1) the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.'" Hughston v. New Home Media, 552 F. Supp. 2d 559, 570 (E.D. Va. 2008) (quoting Bennett v. Fairfax County, 432 F. Supp. 2d 596, 602 (E.D. Va. 2006)).

2. Evidence of Battery

Defendants seek judgment as a matter of law on the basis that the record does not support the jury's finding that a battery occurred. They challenge whether there was evidence of a battery occurring after May 21, 2000 as required for the claim to be timely, and they also contend that a reasonable jury could not conclude that any touchings caused "harm or offense" to Plaintiff. Further, Defendants claim that they are entitled to a new trial because the verdict is against the clear weight of the evidence and will result in a miscarriage of justice if allowed to stand. These assertions are not well-taken.

The jury found that conduct constituting battery occurred within the required time frame—on or after May 21, 2000. Plaintiff testified that during the "latter half of the year 2000, after May," there were "many" "incidents where David

Siegel came to the spa and touched" her. (Trial Tr. Feb. 12, 2008, Doc. 238, at 85). This included an occasion where he pushed her against a wall. (Id. at 85-86). Plaintiff also testified that Mr. Siegel slapped her on the buttocks and that she was "upset," "sad," and "hurt" about these events that occurred "during [her] last few months of employment"; did not want to go to work; and felt deflated when she went home at night; and was "on an emotional roller coaster" because she loved her job but did not enjoy Mr. Siegel's actions. (Id. at 88, 103, 109-10). Plaintiff was employed with the company until December 2000, so the "last few months of employment" were clearly within the post-May 20 timeframe.[8]

Another witness, Kelly Oehrle, testified that she saw Mr. Siegel touch Plaintiff at the spa. (Trial Tr. Feb. 13, 2008, Doc. 239, at 86). Ms. Oehrle worked at the spa from May 1, 2000 until December 1, 2000

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[8]Plaintiff also testified that she performed eight to ten spa treatments called "seaweed gamage" on Mr. Siegel at the spa and that while he was in the "cocoon stage" of the treatments "he would let his hands wander and wander up the back of [her] legs and on to [her] butt." (Trial Tr. Feb. 12, 2008, Doc. 238, at 89-91; see also Trial Tr. Feb. 13, 2008, Doc. 239, at 43-45). However, there was no testimony about exactly when these incidents occurred, though they must have been sometime after November 1999, when the spa opened.

(id. at 84); thus, all but the first three weeks of her employment was within the required time frame for the battery. Ms. Oehrle recounted two occasions where she observed Mr. Siegel touching Plaintiff. First, she described an afternoon when Mr. Siegel and his wife came into the spa and Mr. Siegel "reach[ed] out and touch[ed]" Plaintiff. (Id. at 86). According to Ms. Oehrle, Mr. Siegel "lean[ed] into" Plaintiff and invited Plaintiff to come home with him and his wife. (Id. at 86-87). Plaintiff tried "to be as professional as she possibly could be" during this incident, and Ms. Oehrle saw her try to push Mr. Siegel away and say "Don't do that." (Id. at 87). Mr. Siegel's young daughter was also present, running around Mr. Siegel's legs; after Plaintiff commented that the daughter should not crawl on Mr. Siegel's legs, Mr. Siegel said something to Plaintiff like "why don't you come home and crawl all over [my] legs and . . . body." (Id. at 86-89). After this occurred, Plaintiff offered her apologies to Ms. Oehrle for having to witness the incident. (Id. at 89). In the second incident that Ms. Oehrle observed, Mr. Siegel was standing very close to Plaintiff in the hallway of the spa, with his hand on her shoulder, "leaning into her." (Id. at 89-90). Plaintiff's back was up against the wall, and Plaintiff was trying to maintain her composure and was motioning with her hands for Mr. Siegel to "back off." (Id. at 90).

When the incident was over, Plaintiff appeared relieved. (Id.). As noted earlier in this Order, during her rebuttal case, Plaintiff testified that Ms. Oehrle was present for pinning incidents a couple of months after Oehrle was hired and again right before Ms. Oehrle left. (Trial Tr. Feb. 19, 2008, Doc. 242, at 157-58). This testimony is sufficient to support a finding by the jury that a battery occurred sometime on or after May 21, 2000.[9]

Additionally, a jury issue was clearly presented regarding the matters of "offense or harm" and causation. "A battery consists of the infliction of a harmful or offensive contact upon another with the intent to cause such contact or the apprehension that such contact is imminent." Paul v. Holbrook,

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[9]The Court rejects Defendants' argument that the jury must have concluded that the battery occurred after September 15, 2000. This argument is based on the fact that the jury found no act of sexual harassment occurring on or after September 15, 2000, yet found that an incident of battery occurred on or after May 21, 2000. Although a battery of the kind described at trial could form part of a sexual harassment claim, it need not necessarily be part of one. In other words, the jury could have found that an act of battery occurred between May 21, 2000 and September 14, 2000 that was not part of the sexual harassment that the jury determined occurred sometime before September 15, 2000.

696 So. 2d 1311, 1312 (Fla. 5th DCA 1997). "[T]he tort of battery exists to protect the integrity of the person." Id. (citing W. Page Keeton, et al., Prosser and Keeton on Torts § 9 (5th ed. 1984)). "'Proof of the technical invasion of the integrity of the plaintiff's person by even an entirely harmless, but offensive contact entitles the plaintiff to vindication of the legal right by an award of nominal damages, and the establishment of the tort cause of action entitles the plaintiff also to compensation for the resulting mental disturbance, such as fright, revulsion or humiliation." Id. (quoting Prosser and Keeton § 9). Further, "[t]he element of personal indignity involved always has been given considerable weight. Consequently, the defendant is liable not only for contact[s] which do actual harm, but also for those relatively trivial ones which are merely offensive and insulting . . . ." Id. (quoting Prosser and Keeton § 9). "No evidence of an intention to cause harm is necessary." Id.; cf. Beard v. Flying J, Inc., 266 F.3d 792, 803 (8th Cir. 2001) (rejecting defendant's argument that he was entitled to a judgment notwithstanding the verdict because there was no evidence that the plaintiff was injured by the battery, noting that under Iowa law "[w]hen, as here, the defendant's conduct was intentional, a plaintiff is entitled to damages for emotional distress . .

. even if he or she suffered no physical injury").

"Offensiveness is an essential element of the tort," and the Paul court found that "[t]he act of approaching a co-worker from behind while on the job and attempting to massage her shoulders" presented "a question of fact for the trier of fact to decide." 696 So. 2d at 1312. So, too, in this case; there was conflicting evidence for the jury to resolve as the finder of fact on the issues of offensiveness and causation. Although Defendants assert that other events going on during this timeframe caused whatever distress Plaintiff was suffering, there was evidence from which the jury could reasonably conclude that Mr. Siegel's touching of Plaintiff caused her emotional harm. Defendants are not entitled to judgment as a matter of law on the issue of whether a battery occurred.

Moreover, Defendants' motion for a new trial on the basis that the verdict on the battery claim is against the clear weight of the evidence (see Doc. 253 at 5-7) is without merit. In support of this part of their new trial motion, Defendants assert that "[t]he jury here deliberated for barely three (3) hours in [a] case which took six days to try" and aver that "[a]n honest and fair deliberation by eight impartial jurors could not be conducted in that time." (Id. at 6). Defendants further argue that the jury

"responded in a trivial way" to "the complicated interplay between the hostile work environment and battery analyses," the timing issues, and other matters presented at the trial. However, these points are not well taken.

First, "the length of time the jury deliberates is immaterial" so long as "the evidence is sufficient to support the verdict." Marx v. Hartford Accident & Indem. Co., 321 F.2d 70, 71 (5th Cir. 1963). As discussed earlier, the evidence is sufficient in this case. Moreover, a three-hour deliberation in a six-day case is not unduly short or indicative of any lack of attention by the jury in any event, and indeed, the fact that the jury reached different conclusions with regard to the timeliness of the hostile environment and battery claims indicates that the jury paid careful attention to the details and the issues before them. The jury's verdict for Plaintiff on the battery claim is not against the clear weight of the evidence that was presented at trial, and Defendants are not entitled to a new trial on this basis.

3. Compensatory Damages

Defendants challenge both the award of compensatory damages on the battery claim and the amount of those damages. They argue that Plaintiff did not establish emotional pain caused by the battery so as to support an award of damages, and they

contend that the amount of damages awarded is excessive and not supported by the evidence. Defendants also claim entitlement to a new trial based on the size of the award.

The Court will not disturb the compensatory damages award. It was undisputed that Plaintiff was not physically injured by the battery, and accordingly the jury was instructed that the elements of compensatory damage on the battery claim were "emotional pain and mental anguish." (See Jury Instructions, Doc. 232, at 17). Plaintiff's trial testimony is sufficient to establish compensable damages; medical testimony in corroboration of emotional distress is not required. See, e.g., Muñoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1348-49 (11th Cir. 2000) (upholding award of compensatory damages for emotional distress on FCRA claim despite lack of medical testimony; plaintiff's "testimony concerning the emotional and dignitary impact of [his] termination was sufficient to justify the jury's award"); Malta v. Slagle, No. 05-CV-342S, 2008 WL 4147134, at *3-4 (W.D.N.Y. Sept. 3, 2008) (declining to vacate award of damages for emotional distress in § 1983 case, stating that the "failure to provide medical evidence of injuries does not preclude an award of emotional distress damages" and that "there was evidence of harassing conduct by Defendants which

substantiated [one of the plaintiff's] testimony concerning her anxiety and emotional distress"). Although the Defendants contend that Plaintiff did not describe at length the emotional pain and mental anguish she suffered, there was sufficient testimony at trial from Plaintiff and Ms. Oehrle supporting an award of damages for emotional pain and mental anguish in this case.

Defendants also argue that the compensatory damages award of $102,223.14 is excessive. In a case such as this where a pendent state law claim is involved, the issue of the excessiveness of a damage award is governed by federal standards but guided by state law. In other words, "'[t]he role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered.'" Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 435 (1996) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279 (1989)); see also Johnson v. Clark, 484 F. Supp. 2d 1242, 1256 (M.D. Fla. 2007) ("The decision whether to grant a new trial or remittitur on the grounds of excessive damages is a matter within the sound discretion of the district court. In a diversity case, the court looks to state substantive law to determine whether

the verdict is excessive."); cf. Lundgren v. McDaniel, 814 F.2d 600, 605 (11th Cir. 1987) ("[T]he *Erie* doctrine also applies to pendent state claims litigated in federal courts.").

The Florida statute regarding court assessment of a jury's damage awards provides in pertinent part that "[i]n any action . . . wherein the trier of fact determines that liability exists on the part of the defendant and a verdict is rendered which awards money damages to the plaintiff, it shall be the responsibility of the court, upon proper motion, to review the amount of such award to determine if such amount is excessive . . . in light of the facts and circumstances which were presented to the trier of fact." § 768.74(1), Fla. Stat. This statute expressly states that "[i]t is the intention of the Legislature that awards of damages be subject to close scrutiny by the courts and that all such awards be adequate and not excessive." Id. § 768.74(3). Moreover:

> In determining whether an award is excessive or inadequate in light of the facts and circumstances presented to the trier of fact and in determining the amount, if any, that such award exceeds a reasonable range of damages or is inadequate, the court shall consider the following criteria:

> (a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact;
>
> (b) Whether it appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amounts of damages recoverable;
>
> (c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;
>
> (d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered; and
>
> (e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

Id. § 768.74(5). As Florida's Fourth District Court of Appeal recently noted, "[t]his is a generic list," City of Hollywood v. Hogan, 986 So. 2d 634, 648 (Fla. 4th DCA 2008), and in the employment discrimination

setting[10] other criteria that courts have considered include "whether the plaintiff lost the esteem of her peers," "suffered physical injury as a consequence of her emotional distress," "received psychological counseling or other medical treatment," or "suffered a loss of income"; "the degree of emotional distress," "the context of the events surrounding the distress"; "the evidence tending to corroborate the plaintiff's testimony"; "the nexus between the challenged conduct and the emotional distress," and "any mitigating circumstances," id. (citing Price v. City of Charlotte, 93 F.3d 1241, 1254 (4th Cir. 1996)).

Considering the statutory and judicially-noted criteria, the Court is unable to conclude that the award of just over $100,000 in this case is outside the "reasonable range," though it is certainly at the upper end of that range. Courts have recognized that review of "'awards of compensatory damages for intangible, emotional harms is deferential to the fact

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[10]The Court recognizes that the claim now at issue is Plaintiff's battery claim and not her Title VII or FCRA claim. However, the battery occurred in the employment setting and was related to her discrimination claims. Thus, the factors noted in the employment discrimination setting are also instructive here.

finder because the harm is subjective and evaluating it depends considerably on the demeanor of the witnesses.'" Muñoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1349 (11th Cir. 2000) (quoting Ferrill v. Parker Group, Inc., 168 F.3d 468, 476 (11th Cir. 1999)); accord Landis v. Landis, 664 N.E.2d 754, 757 (Ind. Ct. App. 1996) ("Awards for pain, suffering, fright, humiliation and mental anguish are particularly within the province of the jury because they involve the weighing of evidence and credibility of witnesses.").

Awards for emotional distress damages vary widely, and judgments for $100,000 or more have been upheld even where a plaintiff relies on her own testimony to establish emotional distress. Cf. Muñoz, 223 F.3d at 1349 (upholding $150,000 emotional distress verdict in age discrimination case where plaintiff's testimony was the sole evidence of emotional damage); City of Hollywood v. Hogan, 986 So. 2d 634, 649 (Fla. 4th DCA 2008) (noting that in discrimination cases, "'an award of $150,000 for emotional distress should be viewed as an upper threshold'" (quoting Bernstein v. Sephora, 182 F. Supp. 2d 1214, 1229 (S.D. Fla. 2002))[11]; Landis, 664 N.E.2d

[11]In Hogan, the Fourth District Court of Appeal noted that in "'garden-variety mental anguish claims

at 758 (finding that award of $537,200 for pain, suffering, and emotional distress in case involving claims of assault and battery, intentional infliction of emotional distress, and intentional interference with business relationship was not excessive); Baldwin v. McConnell, 643 S.E.2d 703, 705-06 (Va. 2007) (reversing, as abuse of discretion, trial court's remittitur of compensatory damages on counterclaim for assault and battery from $240,000 to $1000 and reinstating verdict to extent of $100,000 as claimed in ad damnum clause); Nash v. Sue Har Equities, LLC, 846 N.Y.S.2d 215, 216 (App. Div. 2007) (reducing damages on assault claim from $190,000 to $100,000, noting that "although [the court was] mindful that considerable deference is

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awards hover in the range of $5,000 to $30,000'" and that such cases generally involve evidence of damages only in the form of "'testimony of the plaintiff, who describes the emotional distress in vague or conclusory terms, presents minimal or no evidence of medical treatment, and offers little detail of the duration, severity, or consequences of the condition.'" 986 So. 2d at 649 (quoting Reiter v. Metro. Transp. Auth. of N.Y., No. 01 Civ. 2762(JGK), 2003 WL 22271223, at *9 (S.D.N.Y. Sept. 30, 2003)). The court nevertheless set the cap for noneconomic damages in the case before it at $150,000 for one of the plaintiffs, who testified that he felt stressed and had been diagnosed with highblood pressure but did not present evidence of a causal connection between his denied promotion and his high blood pressure. See id. at 647-50.

to be afforded the jury's interpretation of the evidence . . . the award of $190,000 for pain and suffering so materially deviates from what would be reasonable compensation [that the court] exercise[d] its discretion and reduce[d] the award"; "the plaintiff . . . suffered pain to his head and a laceration requiring several stitches" but his "testimony as to his injuries . . . was not amplified by other competent testimony, expert or otherwise, sufficient to establish the severity and permanency of his injuries and does not support the monetary award"); Stockett v. Tolin, 791 F. Supp. 1536, 1556 (S.D. Fla. 1992) (awarding, after bench trial, compensatory damages in the aggregate amount of $250,000 on female employee's Florida state law claims of battery, invasion of privacy, false imprisonment, and intentional infliction of emotional distress against her male boss; battery involved "the repeated and offensive touching of the most private parts of [the plaintiff's body")[12]Inappropriate comments made

[12] In other cases, awards have been lower. See, e.g., Worth v. Tyer, 276 F.3d 249, 268-69 (7th Cir. 2001) (upholding battery damages of $50,000 where defendant touched plaintiff's breast for several seconds); Hughston v. New Home Media, 552 F. Supp. 2d 559, 566-67 (E.D. Va. 2008) (finding that jury's $40,000 compensatory damage award solely for emotional harm on battery claim was "not out of proportion to [the plaintiff's] emotional injuries"

during the touching, such as those testified to by Ms. Oehrle,may be taken into account in assessing damages, as may the fact that Mr. Siegel was Plaintiff's boss and that he touched her in front of other employees during business hours; such circumstances add to the humiliation. Cf. Hughston, 552 F.

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where supervisor "repeatedly subjected [the plaintiff] to such indignities as touching her buttocks, breasts, crotch, and shoulders . . . over a three month period"); Meadows v. Guptill, 856 F. Supp. 1362, 1371-72 (D. Ariz. 1993) (awarding $2500 in compensatory damages on battery claim following bench trial where the defendant "frequently patted [the plaintiff] on the rear end over a seventeen month period"; "grabbed against her body"; and grabbed or tugged at plaintiff's blouse; plaintiff was also awarded $50,000 on hostile work environment claim and $50,000 in punitive damages); Lowrey v. Pettit, 737 So. 2d 213, 217 (La. Ct. App. 1999) (reducing damages award on battery claim from $30,000 to $15,000 where plaintiff, who alleged battery by her boss in the form of unwanted touchings, "did not produce any medical records of treatment for her condition and the duration of her symptoms [was] unclear from the testimony"; the plaintiff "suffered from a continuing pattern of batteries . . . during a period of approximately two years" and "testified that she felt violated by the defendant's conduct and . . . was often emotionally upset and nervous [and] experienced trouble sleeping and eating due to the anxiety and stress caused by defendant's unwelcome physical contact"). The Court's role, however, is not to substitute its judgment for that of the jury as the factfinder but to review the award for excessiveness.

Supp. 2d at 567 (noting, in reviewing jury's assessment of compensatory damages on battery claim, that "[t]here can be few more insulting injuries than being subjected to unwelcome sexual touchings by a supervisor, accompanied by lewd solicitations for sex, in the workplace"). Although there is at least one mitigating circumstance in this case—the fact that Plaintiff and Mr. Siegel were, as Plaintiff herself acknowledged, "friends" who socialized with one another through the end of her employment (see Doc. 238 at 179), affording deference to the jury's determination and in light of the comparable awards that have been upheld in other cases the Court will not disturb the amount of the jury's compensatory damages award.[13]Defendants' Rule 50 and Rule 59

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[13] The Court rejects Defendants' contention that the amount of compensatory damages is suspect because it is equivalent to the amount of Plaintiff's final annual salary. The Court will not reduce or vacate the award on this basis alone, and as noted by Plaintiff, juries sometimes award equivalent amounts of emotional distress damages and lost wages. See, e.g., Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1275 (11th Cir. 2008) (noting jury's verdict of $27,160.59 in back pay and an equal amount for mental anguish in Title VII case). Even though lost wages were not an element of damages in the case at bar, the fact that the jury decided upon this amount for the emotional anguish compensation does not render it per se unreasonable. The Court does not

motions are denied with regard to compensatory damages.

4. Punitive Damages

Defendants contend that punitive damages may not be appropriately awarded in this case. Additionally, Defendants challenge the amount of punitive damages awarded as excessive.

The Court cannot conclude as a matter of law that the evidence did not support the imposition of punitive damages.[14] Under Florida law, "[a] defendant may be held

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conclude, as urged by Defendants, that the jury improperly awarded Plaintiff lost wages on this claim despite being instructed that it could not do so.

[14]This portion of Defendants' challenge to the award of punitive damages arises under Rule 50. See EEOC v. W&O, Inc., 213 F.3d 600, 610 (11th Cir. 2000) (noting that a "challenge to the sufficiency of the evidence as to punitive damages is governed by" Rule 50). Plaintiff asserts in her response memorandum that Defendants did not preserve their argument regarding submitting the issue of punitive damages to the jury. (See Doc. 270 at 18). However, the Court finds the argument preserved. (See Trial Tr. Feb. 19, 2008, Doc. 242, at 177, 188 (court's ruling that punitive damages instruction will be given, noting that "[t]o the extent that was a Rule 50 motion, it's denied," and discussing the standard for punitive damages on the battery claim)).

liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence." §768.72(2), Fla. Stat.

The "gross negligence" facet did not apply in this case because battery is an intentional tort, and the jury was duly instructed that it could award punitive damages on the battery claim only if it found, "based on clear and convincing evidence, that David Siegel was personally guilty of intentional misconduct." (Jury Instructions, Doc. 232, at 23). "Intentional misconduct," as defined by Florida statute and the jury instructions, "means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage." § 768.72(2)(a), Fla. Stat.; (see also Doc. 232 at 23).

Florida courts have held that the commission of intentional battery "supplies the requisite proof . . . justifying a punitive damages award." Canseco v. Cheeks, 939 So. 2d 1122, 1123 (Fla. 3d DCA 2006). In the instant case, a reasonable jury could have concluded—if it accepted the evidence presented by Plaintiff, as was its

prerogative—that Mr. Siegel knew he was acting wrongfully and that there was a high probability that injury or damage to Plaintiff would result. Cf. Hughston, 552 F. Supp. 2d at 568-69 (finding that evidence supported jury's finding of entitlement to punitive damages on battery claim under Virginia law; defendant was plaintiff's direct supervisor, conduct persisted over a three-month period, and the plaintiff's "testimony demonstrate[d] that she suffered great indignities at the hands of [the defendant] that understandably caused her to feel embarrassment, humiliation, fear, and anger"); Beard, 266 F.3d at 804 ("The evidence . . . tended to show that [the defendant] intentionally touched [the plaintiff's] breasts, and a jury could certainly infer that he did so with a willful disregard for [her] rights. We therefore believe that the record contains more than sufficient evidence to allow a jury to award punitive damages."). Defendants' motion for judgment as matter of law on the issue of whether punitive damages could be awarded at all on the evidence presented is denied.

Defendants also challenge the amount of punitive damages—$5,276,640—as

excessive.[15] As with the award of compensatory damages, this Court's review of the size of the punitive damages award is conducted under federal standards but guided by state law. "In a . . . lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law. Federal law, however, will control on those issues involving the proper review of the jury award by a federal district court and court of appeals." Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 278-79 (1989) (footnote omitted).

This Court's first task is "to determine whether the jury's verdict is within the confines set by state law." Id. at 279. The award of punitive damages of over $5 million

[15]The parties dispute whether this challenge is properly brought under Rule 50 or Rule 59. To the extent the issue is whether the amount is sustainable as a matter of law—that is, under a statutory cap or the Constitution—the motion arises under Rule 50, but with regard to whether it should be reduced via remittitur, it arises under Rule 59. See Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1331 (1999) (noting that "a court proceeds under Rule 50, not Rule 59, in the entry of judgment for a constitutionally reduced award").

is not within these confines, and therefore it cannot stand. The Florida legislature has placed caps on punitive damages awards, and the instant award is subject to those caps. Generally, "[a]n award of punitive damages may not exceed the greater of . . . [t]hree times the amount of compensatory damages . . . or . . . [t]he sum of $500,000." §768.73(1)(a), Fla. Stat. The only potentially applicable exception to this limitation is that "[w]here the fact finder determines that at the time of injury the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there shall be no cap on punitive damages." Id. § 768.73(1)(c).

Although Plaintiff asserts in her opposition memorandum that the jury made the requisite findings under section 768.73(1)(c) to support an unlimited punitive damages award, the jury did not do so. The jury was instructed, in accordance with the Florida standard jury instruction on this issue, that it should *consider* whether Mr. Siegel "had a specific intent to harm the Plaintiff and [whether] the conduct of [Mr.] Siegel did in fact harm the Plaintiff" (Doc. 232 at 24), but the verdict form does not indicate that the jury made either of these

findings.[16] Absent such findings, under the plain terms of the statute, the award is subject to the cap in section 768.73(1)(a)—$500,000.

Defendants' main argument with regard to the amount of the punitive damages award is that is excessive and must be reduced under both Florida's remittitur statute, section 768.74, Florida Statutes,[17] and the U.S. Constitution. Defendants focus on the total award, mentioning the statutory cap discussed above only in a footnote. However, the excessiveness of the award under Florida's punitive damages cap statute was the first step, and the remittitur and unconstitutionality analysis must focus on this new, capped amount. Cf. St. John v.

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[16]Plaintiff's counsel did not object to the verdict form with regard to punitive damages, and the proposed verdict form that Plaintiff proposed before trial (Doc. 207) did not ask the jury to make these findings. Plaintiff cannot now claim entitlement to uncapped punitive damages without these findings in the face of a plainly written Florida statute that requires specific determinations by the fact finder in order for the caps not to apply.

[17]The punitive damages cap statute, section 768.73(1), provides in part that "[t]his subsection is not intended to prohibit an appropriate court from exercising its discretion under s. 768.74 in determining the reasonableness of an award of punitive damages that is" within the statutorily capped amount. §768.73(1)(d), Fla. Stat.

Coisman, 799 So. 2d 1110, 1112 (Fla. 5th DCA 2001) ("Where punitive damages are challenged on federal constitutional grounds in a state court, the first step in the analysis should be to determine whether state statutes apply to potentially limit or reduce the damages. If they do and the result is remittitur or reduction, this may obviate the federal constitutional challenge. But even if reduced, punitive awards may still need to be reviewed under the federal criteria, since the federal criteria are not the same as the state criteria for limiting, capping, or reducing the award."); EEOC v. W&O, 213 F.3d 600, 614 (11th Cir. 2000) (addressing argument "that the punitive damages awarded, even after reduction pursuant to the statutory cap, [were] excessive"). This Court will consider the constitutional guideposts established by the Supreme Court together with the considerations in Florida's remittitur statute in assessing whether further reduction in the punitive damages amount is warranted here. Cf. W&O, 213 F.3d at 614 (noting that the constitutional analysis is also "'instructive' to courts considering the amount of punitive damages awarded in employment discrimination cases").

"The Supreme Court has held that due process forbids the imposition of grossly excessive or arbitrary awards of punitive damages." Goldsmith v. Bagby Elevator Co.,

513 F.3d 1261, 1282 (11th Cir. 2008) (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996)). "In Gore, the Supreme Court instructed courts reviewing punitive damages awards to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the ratio between the actual or potential harm suffered by the plaintiff (compensatory damages) and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Id. (citing Gore, 517 U.S. at 575).

The first Gore guidepost—the reprehensibility of the defendant's conduct—is "[t]he dominant consideration in the evaluation of a punitive damages award." Id. at 1283 (citing Gore, 517 U.S. at 575). In evaluating this reprehensibility, "a court must consider several issues: (1) whether the harm caused was physical as opposed to economic; (2) whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct involved repeated actions or was an isolated incident; and (5) whether the harm was the result of intentional malice, trickery, or deceit, or mere accident." Id.

Evaluating these issues, the harm here was emotional rather than economic; there is some disregard of health at play insofar as Plaintiff's emotional health was involved; financial vulnerability is implicated somewhat because, although this battery claim did not involve financial consequences for Plaintiff *per se*, the events did occur in the workplace and Plaintiff's boss—who controlled Plaintiff's earnings—was the one who committed the acts; there is some evidence of repeated actions, though only a six-month time period is at issue; and battery is an intentional tort, although malice is not required for its commission. On balance, Mr. Siegel's conduct is at the low to middle range of the reprehensibility scale.

With regard to the second Gore guidepost—the ratio between the punitive damages award and the compensatory damages—the Supreme Court has declined to definitively declare the maximum permissible ratio but has held that "'[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with [higher] ratios.'" Goldsmith, 513 F.3d at 1283 (quoting State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003)) (second alteration in original). Here, the ratio was originally 51.6 to1 ($5,276,640 to $102,223.14) but is now, after the statutory cap has been taken into

account and applied, less than 5 to 1 ($500,000 to $102,223.14). This ratio does not suggest an excessive award.

The final Gore guidepost—comparison to civil penalties allowed or imposed in similar cases also does not suggest excessiveness in this case. Florida law does allow for a criminal penalty for battery of up to one year imprisonment and a fine of not more than $1000. See §§ 784.03(1), 775.082(4)(a), & 775.083(1)(d), Fla. Stat. However, while "'[t]he existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action,' when comparisons to criminal penalties are 'used to determine the dollar amount of the award . . . the criminal penalty has less utility.'" Kemp v. Am. Tel. & Tel. Co., 393 F.3d 1354, 1364 (11th Cir. 2004) (quoting Campbell, 538 U.S. at 428). More telling is the Florida statutory cap on damages, which clearly provides for an award of up to $500,000. Cf. EEOC v. W&O, Inc., 213 F.3d 600, 617 (11th Cir. 2000) (noting, in affirming district court's refusal to reduce punitive damages below statutory maximum, that 42 U.S.C.§ 1981a "put [the defendant] on notice that it could be liable for punitive damages up to the statutory cap"); accord EEOC v. Fed. Express Corp., 513 F.3d 360, 378 (4th Cir. 2008) ("The statutory cap of $300,000 provided FedEx with fair notice of the range of available civil

penalties for acts of discrimination that contravened the ADA."). The concern noted in Campbell, that "'[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose,'" 538 U.S. at 417 (quoting Gore, 517 U.S. at 574), is not implicated here.

Comparing the $500,000 award to awards that have been imposed in other cases, the award is not constitutionally suspect. There is much variety in punitive damages awards, but similar or larger awards have been upheld, even where the ratio to compensatory damages is much higher. See, e.g., Goldsmith, 513 F.3d at 1282-85 (upholding punitive damages award of $500,000 in § 1981 case where ratio to compensatory damages was 9.2 to 1); Weaver v. African Methodist Episcopal Church, 54 S.W.2d 575, 589 (Mo. Ct. App. 2001) (finding that punitive award of $1 million on battery claim, which constituted 66 to 1 ratio to compensatory damage award, was not excessive, where "there was evidence at trial from which the jury could believe that not only did [the defendant] commit a battery by grabbing [the plaintiff's] breasts but that act was merely the culmination of a long history of far worse verbal and physical sexual harassment"); see also Bogle v. McClure, 332

F.3d 1347, 1359-62 (11th Cir. 2003) (affirming award of $500,000 in compensatory damages to each plaintiff–as reduced by district court from $1 million for each plaintiff–and $2 million in punitive damages to each plaintiff in race discrimination case under § 1981).

Defendants contend that under the Florida remittitur statute factors, the jury's award[18] is "inexplicable" (Doc. 254 at 19) and that "the inflamed passions of the jury, not the relevant facts established at the trial, . . . led to such an outrageously excessive award" (Doc. 253 at 10). Defendants seek not only a reduction in amount but also a new trial on this basis. However, the Court does not find that the jury acted out of improper considerations in assessing damages. While "[a] punitive damage award may not be 'grossly out of proportion to the severity of the offense,'" "in promoting deterrence, the economic wealth of a tortfeasor may be considered." Johansen, 170 F.3d at 1338 (quoting Gore, 517 U.S. at 576). For example, "[a] bigger award is needed to 'attract the attention . . .' of a large corporation." Id. (quoting Cont'l Res., Inc. v. OXY USA, Inc.,

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[18]Again, Defendants' arguments are directed at the$5 million+ amount. The Court assumes that Defendants would also argue that the $500,000 amount is also excessive.

101 F.3d 634, 641 (10th Cir. 1996)) (second alteration in original). In this case the jury was instructed, in accordance with the Florida standard jury instructions, that it "should consider . . . each Defendant's financial resources" but that it could "not award an amount that would financially destroy the Defendants." (Doc. 232 at 24; see also Fla. Std. Jury Instruction PD 2(d)(2)). There are five defendants in this case—Mr. Siegel and four corporate entities of whom he undisputedly is the alter ego such that they are also liable for his actions. Mr. Siegel testified at trial that Defendant Westgate Resorts, Limited had a net worth of just over $471 million (Trial Tr. Feb. 14, 2008, Doc. 240, at 20); and that he individually had a net worth of more than $324 million, which includes his stock in the companies (id. at 19-20). Based on the $471 million figure, the original punitive damages award of $5,276,640 is just over 1% of that net worth estimate, and the capped award of $500,000 is only one tenth of one percent of net worth. Indeed, Defendants do not even assert that when viewed as a portion of their wealth the award is excessive. Cf. EEOC v. W&O, 213 F.3d at 616-17 (noting that defendant did "not argue that the award [was] disproportionate in comparison to the net worth of the company" and concluding that the $300,000 punitive award "was reasonable in terms of the interest in

deterring illegal discrimination"). Thus, the jury's large award in this case "could be adduced in a logical manner by reasonable persons" and does not appear to be the result of "prejudice, passion, . . . corruption," or other "improper elements of damages." See § 768.74(5), Fla. Stat. (listing these among the criteria).

In Johansen, the Eleventh Circuit upheld the district court's reduction of a $15 million punitive damage award to $4.35 million even though it was 400 times greater than the authorized civil sanction, the defendant corporation's conduct in polluting the environment was not found to be highly reprehensible, and even the reduced punitive damages award resulted in a 100 to 1 ratio of punitive damages to civil damages. Weighing the Gore factors, the court concluded "that substantial punitive damages are warranted for deterrence" and noted that Georgia statutes "provided fair notice to [the defendant] that it might be subject to a substantial penalty." 170 F.3d at 1339. The court further noted that "[t]he 100:1 ratio of the punitive to the actual damages is at the upper limits of the Constitution, but is justified by the need to deter this and other large organizations from a 'pollute and pay' environmental policy." Id. The court thus found that the original award of $15 million was constitutionally excessive but that the reduced amount of $4.35 million was not. Id.;

see also Kemp, 393 F.3d at 1365 (finding that where plaintiff's actual damages were only $115 and punitive damages were $1 million, punitive award would be reduced to $250,000 because a lesser award "would not serve as a meaningful deterrent to a corporation like AT&T" but a greater award "would prove an unconstitutional windfall"); cf. Estate of Despain v. Avante Group, Inc., 900 So. 2d 637, 640 (Fla. 5th DCA 2005) ("Punishment of the wrongdoer and deterrence of similar wrongful conduct in the future, rather than compensation of the injured victim, are the primary policy objectives of punitive damage awards."). Further reduction of the $500,000 capped punitive damages award is not warranted by either the Constitution or Florida law.[19] While the conduct at issue is in the low to mid range of the reprehensibility scale,

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[19] The Eleventh Circuit has held, albeit in a Title VII case involving Title VII's damages caps, "that it is only appropriate for a judge to reduce a punitive damages amount to below the amount allowed under [Title VII's] statutory cap if the award is unreasonable or otherwise shock[s] the judicial conscience and constitute[s] a denial of justice." W&O, 213 F.3d at 617 (citations and internal quotations omitted) (alterations in original). The $500,000 capped amount does not "shock the conscience" or result in a denial of justice here.

In a Tenth Circuit case cited in W&O, the court rejected the argument that "the statutory maximum should be reserved for the most severe

the ratio of punitive damages to compensatory damages is only 5 to 1, and in light of the extreme wealth of the Defendants a substantial award is necessary to serve the purposes of punishment and deterrence. A $500,000 award—the maximum award allowed by state law—still

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misconduct," and held that "only when an award would 'shock the judicial conscience, and constitute a denial of justice,' for example because it would 'result in the financial ruin of the defendant' or 'constitute a disproportionately large percentage of a defendant's net worth,' will [it] reduce the award below the statutory cap." Deters v. Equifax Credit Info. Servs., 202 F.3d 1262, 1273 (10th Cir. 2000). The Deters court declined to further reduce a punitive award in a Title VII sexual harassment case where district court had already reduced it from $1 million to $295,000 to conform to the statutory cap. Compensatory damages in that case were $5000, and thus the ratio was 59 to 1. The court noted the purpose "to punish and deter" and that "the wealth and size of the defendant are relevant considerations. Id. Thus, the defendant's gross annual operating revenue of $1.8 billion was properly considered in that case. Id.; see also Romano v. U-Haul Int'l, 233 F.3d 655, 673 (1st Cir. 2000) (noting, in Title VII case, that "a punitive damages award that comports with a statutory cap provides strong evidence that a defendant's due process rights have not been violated," and upholding punitive damages of $285,000 as reduced by district court to conform to cap where ratio to compensatory damages was 19 to 1).

represents only .1% of net worth for these Defendants; this is the equivalent of a $100 penalty against someone with a $100,000 net worth.

In sum, because as a matter of state law punitive damages may not exceed $500,000 in this case, the award of punitive damages must be reduced to no more than that amount. The Court does not find, however, that this amount is unconstitutionally excessive or in need of further reduction under Florida's remittitur statute under the circumstances of this case, nor is a new trial warranted based on the size of the jury's award. Thus, the punitive damages award will be reduced to $500,000.[20]

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[20]Because this finding is as a matter of law, it is not a "traditional remittitur" and Plaintiff need not be given the option of a new trial on punitive damages; the Seventh Amendment right to a jury trial is not implicated by the reduction. See Estate of Sisk v. Manzanares, 270 F. Supp. 2d 1265, 1277-78 (D. Kan. 2003) (noting that "[f]ederal courts uniformly have held that statutory damages caps do not violate the Seventh Amendment, largely because a court does not 'reexamine' a jury's verdict or impose its own factual determination regarding what a proper award might be . . .[but] simply implements a legislative policy decision to reduce the amount recoverable to that which the legislature deems reasonable"); see also Arismendez v. Nightingale Home Health Care, Inc., 493 F.3d 602, 612 (5th Cir. 2007) (directing district court, without qualification, to remit punitive

5. Juror Concealment

In their Motion for New Trial, Defendants argue in part that a new trial is required because of "juror concealment of involvement in prior litigation." (Doc. 253 at 2). Defendants aver that "it now appears that three jurors seated on this panel have

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damages to state statutory cap of $200,000); cf. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 429 n.9 (1996) ("While we have not specifically addressed the issue, courts of appeals have held that district court application of state statutory caps in diversity cases, postverdict, does not violate the Seventh Amendment."); Ross v. Kansas City Power & Light Co., 293 F.3d 1041, 1049-50 (8th Cir. 2002) (noting that "[w]hile the traditional remedy of remittitur does require the plaintiff's consent in order to comport with the Seventh Amendment right to jury trial, the court's mandatory review of a punitive damages award does not implicate the Seventh Amendment" and that "[t]he plaintiff's consent to a constitutional reduction of a punitive damages award is 'irrelevant' because the court must decide this issue as a matter of law"); Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1330-31 (11th Cir. 1999) (noting that "[w]here a portion of a verdict is for an identifiable amount that is not permitted by law, the court may simply modify the jury's verdict to that extent and enter judgment for the correct amount" and that "[a] constitutionally reduced verdict . . . is really not a remittitur at all" because it is not "a substitution of the court's judgment for that of the jury" but "a determination that the law does not permit the award"); Holmes v. W. Palm Beach Hous. Auth., 309 F.3d 752, 758 (11th Cir. 2002) (finding no

been parties to litigation which they concealed during *voir dire*." (Id. at 4). More specifically, Defendants contend that one juror was involved in a 1999 suit on a promissory note, a 2000 suit to foreclose a mortgage, and another case involving an eviction; that a second juror was involved in a tenant eviction case in 1985; and that a third juror has been a plaintiff in two personal injury cases. According to Defendants, if this "prior litigation" had been disclosed during voir dire, further inquiry of them would have been made by the Court and they would have been disqualified from the jury for cause. This argument is wholly without merit.

As noted by Defendants, the Supreme Court held in McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984), that "to obtain a new trial [based on juror concealment], a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge

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abuse of discretion by trial court in not giving appellant the option of a new trial where as a matter of law the evidence did not support the amount of the verdict").

for cause." Also as noted by Defendants, "the first prong of the McDonough test requires a determination of whether [the juror's] answers were honest, that is, whether he was aware of the fact that his answers were false," United States v. Perkins, 748 F.2d 1519, 1531 (11th Cir. 1984), and the second prong requires a showing of "actual bias," id. at 1532. Defendants have not made either of these showings here.

First, Defendants have not even made a barebones showing that the three jurors whose conduct they challenge are the same people who were in the lawsuits. Defendants have only given case numbers of these lawsuits—one of which occurred more than twenty years ago—and none of the three jurors at issue have unusual names; in other words, it is far from clear that these jurors were even involved in prior litigation. Plaintiff points out in her response that in a newspaper article written shortly after this motion was filed, two of the jurors denied being the people involved in the cited lawsuits. (See Doc. 270 at 8). Although the Court certainly cannot consider a newspaper article outside the record as evidence, it also cannot base the identity of a juror-litigant on Defendants' bald assertion with the listing of a case number.

Second, even assuming that these three jurors were the persons involved in the "prior litigation" noted by Defendants,

Defendants cannot meet their burden on either of the McDonough prongs. The Court asked the venire during voir dire: "Have any of you been a party to a civil lawsuit other than a family related matter such as a dissolution of marriage or an adoption? And you obviously have as an attorney, but have you, have any of you been parties to a lawsuit? Related to your work?" (Trial Tr. Feb. 11, 2008, Doc. 237, at 89-90). Four of the six lawsuits cited by Defendants involved promissory notes or real estate evictions; the other two are described by Defendants as "personal injury cases" and by Plaintiff as "automobile negligence" suits. It is far from clear that a venire member would deem such a case responsive to the court's inquiry. Moreover, the venire was further asked whether any of them had been a witness in a court proceeding. (Id. at 90). When one panel member answered that he had been a witness, the Court made further inquiry and asked if the panel member understood that this case was a different kind of proceeding and was completely unrelated, to clarify whether the prior experience would affect jury service in this case; the panel member said no. (Id. at 90-91). If the three panel members at issue here had disclosed prior case involvement, the Court would have similarly inquired, but Defendants' assertion that such questioning would have led to their disqualification is nothing but speculation.

With regard to the second, "actual bias" prong of McDonough, Defendants also fall far short of meeting their burden. "Actual bias may be shown in two ways: 'by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed.'" Perkins, 748 F.2d at 1532 (quoting United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976)). Certainly there are no "express admissions" of bias here, and there also has been no proof of a "close connection—or a connection of any kind—to the circumstances of this case such that bias by any of these three jurors could be presumed.

Amazingly, regardless of what side a juror allegedly was on in the prior lawsuits, bias in favor of Plaintiff is, according to Defendants, indicated. (See Doc. 253 at 5 (stating that the personal injury/automobile negligence juror "could be expected to be extremely sympathetic to [Plaintiff] considering that both . . . sought recovery for pain and suffering" and that the other two jurors "could both be expected to be extremely sympathetic to [Plaintiff] considering [that the three] were all defendants in suits to recover money"[21])).

[21]On this second point, Defendants are apparently referring to the fact that Defendants sued Plaintiff to recover money in another case, after which Plaintiff

Defendants then make the leap that the alleged bias "has been borne out by the result because "[o]nly a jury made up of people who were less than forthright could award [Plaintiff] such a staggering sum of compensatory and punitive damages." (Doc. 253 at 5). Defendants' speculation and impassioned rhetoric, however, do not satisfy McDonough. They are not entitled to a new trial based on the jurors' voir dire responses.

In sum, Defendants' assertions that these jurors were dishonest and that a new trial is therefore warranted are totally devoid of merit.

B. Defendants' Motion for Entry of Judgment (Doc. 268)

The judgment that was entered by the Clerk on February 29, 2008 provides that Plaintiff shall recover from the Defendants the amounts found by the jury on her battery claims; the judgment does not mention the sexual harassment claims. Citing Federal Rule of Civil Procedure 58(d), Defendants now seek entry of judgment in their favor pursuant to the jury's verdict on Plaintiff's sexual harassment claims under Title VII

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decided to file the instant lawsuit against them. Defendants overlook the fact that in this lawsuit they are the ones who are the defendants in a "suit to recover money."

and the FCRA. (See Doc. 268). Plaintiff opposes this motion. (See Doc. 273). In these filings, the parties again argue about the timeliness of the Title VII claim; this issue has already been addressed herein.

The Court will direct the entry of a more specific judgment. In light of the other rulings in this Order, the original judgment must already be vacated and a new one entered in its stead; the Court will direct entry of a judgment addressing all claims. Defendants' Motion for Entry of Judgment (Doc. 268) is thus granted to the extent that all claims will be addressed in the amended judgment.

C. Defendants' Objections and Motion to Strike Costs (Doc. 260)

The final motion pending before the Court is Defendants' Objections and Motion to Strike Costs Sought in Plaintiff's Bill of Costs (Doc. 260). This motion will be referred to the assigned magistrate judge for resolution in accordance with the Court's usual practice for such motions.

III. Conclusion

In accordance with the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendants' Unopposed Motion to Seal (Doc. 245) is **DENIED as moot**.

2. Defendants' Motion for Remittitur (Doc. 252) is **DENIED**.

3. Defendants' Motion for New Trial (Doc. 253) is **DENIED**.

4. Defendants' Renewed Motion for Judgment as a Matter of Law (Doc. 254) is **GRANTED in part** and **DENIED in part**. To the extent the motion seeks reduction of the amount of punitive damages to the maximum under Florida law, the motion is **GRANTED** and an amended judgment will be entered accordingly. In all other respects, the motion is **DENIED**.

5. Defendants' Request for Oral Argument (Doc. 255) is **DENIED**.

6. Plaintiff's Renewed Motion for Judgment as a Matter of Law Pursuant to Rule 50 on Statute of Limitations (Doc. 257) is **DENIED**.

7. Plaintiff's Motion to Establish Entitlement to Fees Under Title VII and Florida Civil Rights Act (Doc. 258) is **DENIED**.

8. Defendants' Objections and Motion to Strike Costs Sought in Plaintiff's Bill of Costs (Doc. 260) is referred to the assigned magistrate judge.

9. Defendants' Motion for Entry of Judgment (Doc. 268) is **GRANTED**

10. Plaintiff's Motion for Remand of Certain State Claims (Doc. 280) is **DENIED**.

12. Plaintiff's Motion to Vacate Stay and Require Bond (Doc. 285) is **DENIED without prejudice**.

13. Defendants' second Unopposed Motion to Seal (Doc. 286) is **DENIED as moot.**

14. The judgment entered on February 29, 2008 (Doc. 241) is hereby **VACATED**. The Clerk is directed to enter an amended judgment providing that in accordance with the jury's verdict and this Order, Plaintiff shall take nothing from Defendants on her claims under Title VII or the Florida Civil Rights Act and that on her battery claim Plaintiff shall recover from the Defendants $103,622.09 in compensatory damages, as well as $506,847.75 in punitive damages, for a total award of $610,469.84.[22]

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[22]The amounts to be included in the amended judgment have been computed by adding interest at the statutory interest rate provided for in 28 U.S.C. § 1961(a) from the date of the jury's verdict. The jury's verdict was returned on February 20, 2008, and the statutory interest rate for the week ending February 15, 2008 was 2.04%. See 28 U.S.C. § 1961(a) (providing that the rate for the preceding calendar week shall be used). Thus, the Court has added $1398.95 in interest to the compensatory damages

DONE and **ORDERED** in Orlando, Florida this 23rd day of October, 2008.

/s/ John Antoon II
John Antoon II
United States District Judge
Copies furnished to:
Counsel of Record

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award and $6847.75 in interest to the punitive damages award to account for the passage of time from the date of the verdict to the date of entry of this Order and the amended judgment.

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAWN GEORGETTE MYERS,
Plaintiff,
-vs-

Case No. 6:04-cv-1542-Orl-28DAB

CENTRAL FLORIDA INVESTMENTS, INC.,
CFI SALES AND MARKETING, LTD.,
WESTGATE RESORTS, INC., WESTGATE
RESORTS, LTD., and DAVID SIEGEL,
Defendants.

[Filed October 23, 2008]

AMENDED JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Plaintiff, shall take nothing from Defendants on her claims under Title VII or the Florida Civil Rights Act & that on her battery claim Plaintiff shall recover from the Defendants $103,622.09 in compensatory damages, as well as 506,847.75 in punitive damages, for a total award of $610,469.84.

Date: October 23, 2008

SHERYL L. LOESCH, CLERK

s/I. Cammarota, Deputy Clerk

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders**: Courts of Appeals have jurisdiction conferred and strictly limited by statute:

(a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291**: Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. V. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate

judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).

(b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988);

LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

(c) **Appeals pursuant to 28 U.S.C. Section 1292(a)**: Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and from "[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

(d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5**: The

certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

(e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen V. Beneficial Indus. Loan Corp., 337 U.S. 541,546,69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:

(a) **Fed.R.App.P. 4(a)(1):** A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the

United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within

60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

(b) **Fed.R.App.P. 4(a)(3)**: "If one party timely files a notice of appeal, any other party may file a notice of appeal within

14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a),

whichever period ends later."

(c) **Fed.R.App.P.4(a)(4)**: If any party makes a timely motion in the district court under the Federal Rules of Civil

Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

(d) **Fed.R.App.P.4(a)(5) and 4(a)(6)**: Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that

a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

(e) **Fed.R.App.P.4(c)**: If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal

case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal**: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format.

See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant

4. **Effect of a notice of appeal**: A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

Rev. 4/04

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAWN GEORGETTE MYERS,

Plaintiff,

-vs-

Case No. 6:04-cv-1542-0rl-28DAB

CENTRAL FLORIDA INVESTMENTS, INC., CFI SALES AND MARKETING, LTD., WESTGATE RESORTS, INC., and DAVID SIEGEL,

Defendants.
_____/

[Filed February 20, 2008]

VERDICT

Claim One

Do you find from a preponderance of the evidence:

1. That Plaintiff Georgette Myers was an independent contractor?

Answer Yes or No NO

Note: If your answer to Question Number 1 is Yes, please skip to Question Number 3 without answering Question Number 2. If your answer to Question Number 1 is No, please proceed to Question Number 2.

2. That Plaintiff Georgette Myers was an employee of any of the following business entities?

Answer Yes or No for each entity:

Central Florida Investments, Inc.	YES
CFI Sales and Marketing, Ltd.	YES
Westgate Resorts, Inc.	YES
Westgate Resorts, Ltd.	YES

3. That David Siegel subjected the Plaintiff to a hostile or abusive work environment because of her sex or gender?

Answer Yes or No YES

Note: If your answer to Question Number 3 is No, please skip to Question Number 7 without answering Questions 4 through 6. If

your answer to Question Number 3 is Yes, please proceed to Question Number 4.

4. That at least one of the acts of sexual harassment took place on or after September 15, 2000?

Answer Yes or No NO

Note: If your answer to Question Number 4 is No, please skip to Question Number 7 without answering Questions 5 and 6. If your answer to Question Number 4 I s Yes, please proceed to Question Number 5.

5. That the Plaintiff suffered damages in the form of emotional pain and mental anguish as a proximate or legal result of such hostile or abusive environment?

Answer Yes or No _____

If your answer is "Yes," in what amount?
$ _____

6. That David Siegel acted with malice or reckless indifference to the Plaintiffs state- and federally-protected rights?

Answer Yes or No _____

If your answer is Yes, what amount of punitive damages should be assessed?

$_____

Claim Two

7. Do you find from a preponderance of the evidence that Defendant David Siegel committed battery against Plaintiff?

Answer Yes or No YES

Note: If your answer to Question Number 7 is No, please stop and sign this verdict form without answering the remaining questions. If your answer to Question Number 7 is Yes,
please proceed to Question Number 8.

8. Do you find from a preponderance of the evidence that conduct constituting battery occurred on or after May 21, 2000?

Answer Yes or No YES

Note: If your answer to Question Number 8 is No, please stop and sign this verdict form without answering the remaining questions. If your answer to Question Number 8 is Yes,
please proceed to Question Number 9.

9. Do you find from a preponderance of the evidence that Plaintiff should be awarded compensatory damages on the battery claim?

Answer Yes or No YES
If Yes, in what amount? $102,223.14

10. Do you find by clear and convincing evidence that punitive damages should be awarded on the battery claim?

Answer Yes or No YES
If Yes, in what amount, based on a preponderance of the evidence?
$5,276,640.00

SO SAY WE ALL.

/s/ Christine Giorelli

Foreperson

DATED: February 20, 2008

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-16291-JJ

DAWN GEORGETTE MYERS,

Plaintiff Appellee
Cross-Appellant,

Versus

CENTRAL FLORIDA INVESTMENTS, INC.,
DAVID SIEGEL,
WESTGATE RESORTS, INC.,
WESTGATE RESORTS LTD,
CFI SALES AND MARKETING, LTD,

Defendants-Appellants

Cross-Appellees.

[Filed April 19, 2010]

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: MARCUS, FAY and ANDERSON, Circuit Judges

PER CURIAM:
The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
United States Circuit Judge

Supreme Court, U.S.
FILED
AUG 23 2010
OFFICE OF THE CLERK

No. 10-118

In The
Supreme Court of the United States

DAWN GEORGETTE MYERS,

Petitioner,

v.

CENTRAL FLORIDA INVESTMENTS, INC., *et al.*,

Respondents.

ON CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Plaintiff's Seventh Amendment argument was properly preserved.

II. Whether the Eleventh Circuit's Opinion, that the District Court correctly capped Plaintiff's punitive damages at $500,000, violated the Seventh Amendment where the jury failed to find that Defendants specifically intended to harm plaintiff and did in fact harm plaintiff, and where the amount of the jury's punitive damages award exceeded that permitted by law.

III. Whether the Eleventh Circuit's Opinion, that the District Court correctly capped punitive damages at $500,000, was further supported under a federal due process analysis.

IV. Whether the Eleventh Circuit's Opinion, that the District Court did not abuse its discretion by finding that defendants' affirmative defenses were sufficiently particular in denying the timeliness of plaintiff's EEOC complaint, violated the Seventh Amendment or ran afoul of the Federal Rules of Civil Procedure.

V. Whether the Eleventh Circuit's Opinion, that the District Court did not abuse its "considerable discretion" by prohibiting Plaintiff from introducing evidence on rebuttal, which did not "explain, repel, counteract, nor disprove" testimony offered by Defendants' witnesses, violated the Seventh Amendment.

LIST OF PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed here are Petitioners David Siegel; Central Florida Investments, Inc.; CFI Sales & Marketing, Ltd.; Westgate Resorts, Inc.; Westgate Resorts, Ltd.; Westgate Lakes, Inc.; and Westgate Lakes, Ltd. (collectively "Defendant"); and Respondent Dawn Georgette Myers ("Plaintiff").

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Petitioners, David Siegel; Central Florida Investments, Inc.; CFI Sales & Marketing, Ltd.; Westgate Resorts, Inc.; and Westgate Resorts, Ltd., identify Central Florida Investments, Inc.'s parent corporations as the David A. Siegel Irrevocable Trust (99%) and the David A. Siegel Revocable Trust (1%); and identify Westgate Resorts, Ltd.'s parent corporations as Central Florida Investments, Inc. (99%) and the David A. Siegel Irrevocable Trust (.5%). Petitioners further state that there is no publicly held company owning 10% or more of the stock of any of the foregoing entities.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

CORPORATE DISCLOSURE iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

STATEMENT OF THE FACTS 1

A. Factual Background 1

B. Procedural Background 2

1. The District Court: Removal and Summary Disposition 2

2. The first appeal to the Eleventh Circuit and first Petition for Writ of Certiorari to this Court 3

3. The Post-Trial Proceedings 3

4. The second appeal to the Eleventh Circuit and second Petition for Writ of Certiorari to this Court 4

C. Objections to Petitioner's Statement of the Case 5

REASONS FOR DENYING WRIT 6

I. THIS COURT SHOULD DENY THE WRIT BECAUSE PLAINTIFF'S SEVENTH AMENDMENT ARGUMENT WAS NOT PROPERLY PRESERVED 6

II. THE ELEVENTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S RULING THAT PUNITIVE DAMAGES SHOULD BE CAPPED UNDER FLORIDA LAW AT $500,000, WHERE THE JURY FAILED TO FIND THAT DEFENDANTS SPECIFICALLY INTENDED TO HARM PLAINTIFF AND DEFENDANTS' CONDUCT DID IN FACT HARM PLAINTIFF AND WHERE THE AMOUNT OF THE JURY'S PUNITIVE DAMAGES AWARD EXCEEDED THAT PERMITTED BY LAW 7

III. THE ELEVENTH CIRCUIT'S OPINION, THAT THE DISTRICT COURT CORRECTLY CAPPED PUNITIVE DAMAGES AT $500,000, IS FURTHER SUPPORTED UNDER A FEDERAL DUE PROCESS ANALYSIS 18

IV. THE ELEVENTH CIRCUIT'S OPINION, THAT THE DISTRICT COURT DID NOT ABUSE ITS SOUND DISCRETION BY FINDING THAT DEFENDANTS' AFFIRMATIVE DEFENSES WERE SUFFICIENTLY PARTICULAR IN DENYING THE TIMELINESS OF PLAINTIFF'S EEOC COMPLAINT, DID NOT VIOLATE THE SEVENTH AMENDMENT OR RUN AFOUL OF THE FEDERAL RULES OF CIVIL PROCEDURE 28

V. THE ELEVENTH CIRCUIT'S OPINION, THAT THE DISTRICT COURT DID NOT ABUSE ITS "CONSIDERABLE DISCRETION" BY PROHIBITING PLAINTIFF FROM INTRODUCING EVIDENCE ON REBUTTAL WHICH DID NOT "EXPLAIN, REPEL, CONTRAST, NOR DISPROVE" TESTIMONY OFFERED BY DEFENDANTS' WITNESSES, DID NOT VIOLATE THE SEVENTH AMENDMENT 32

CONCLUSION 40

TABLE OF AUTHORITIES

Page(s)

CASES

Annis v. County of Westchester,
136 F.3d 239 (2d Cir. 1998) 22

Ashcroft v. Igbel,
129 S. Ct. 1937 (2009) 31

Ault v. Lhor,
538 So. 2d 454 (Fla. 1989) 12

Bach v. First Union Nat'l Bank,
486 F.3d 150 (6th Cir. 2007) 23, 25

Beard v. Flying J., Inc.,
266 F.3d 792 (8th Cir. 2001) 26

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 31

Bernstein v. Sephora,
182 F. Supp. 2d 1214 (S.D. Fla. 2002) 26

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 19, 24, 25, 26

Bouie v. City of Columbia,
378 U.S. 347 (1964) 20

Braxton v. United States,
500 U.S. 344 (1991) 9

Bridgeport Music, Inc. v. Justin Combs Publ'g.,
507 F.3d 470 (6th Cir. 2007) 23

Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.,
492 U.S. 257 (1989) 6, 7, 13, 15

Cabas-Torres v. State,
502 So. 2d 67 (Fla. 3d DCA 1987) 12

Cason-Merenda v. Detroit Medical Center,
2010 WL 1286410 (Slip Opinion)
(E.D. Mich. 2010) 36

CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.,
499 F.3d 184 (3d Cir. 2007) 23

Chevy Chase Dairy v. Mullineaux,
71 F.2d 985 (C.A. D.C. 1934) 34

City of Hialeah, Fla. v. Rojas,
311 F.3d 1096 (11th Cir. 2002) 33

Clark v. Chrysler Corp.,
436 F.3d 594 (6th Cir. 2006) 23

Cohen v. DeYoung,
655 So. 2d 1265 (Fla. 5th DCA 1995) 12

Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,
532 U.S. 424 (2001) 24, 25

Crawford v. Andrew Systems, Inc.,
39 F.3d 1151 (11th Cir. 1994)..... 37

EEOC v. Klingler Elec. Corp.,
636 F.2d 104 (5th Cir. 1981)..... 30

Engle v. Liggett Group, Inc.,
945 So. 2d 1246 (Fla. 2006)..... 11

Farley v. Nationwide Mut. Ins. Co.,
197 F.3d 1322 (11th Cir. 1999)..... 17, 18

Franceschi v. Hosp. Gen. San Carlos, Inc.,
326 F. Supp. 2d 257 (D. P.R. 2004)..... 26

Fredonia Broadcasting Co., Inc. v. RVA Co.,
481 F.2d 781 (5th Cir. 1973)..... 15, 16, 18

Gasparini v. Ctr. for Humanities, Inc.,
518 U.S. 415 (1996)..... 13

Geders v. United States,
425 U.S. 80 (1976)..... 37

Globe Sec. Sys. Co. v. Mayor's Jewelers, Inc.,
458 So. 2d 828 (Fla. 3d DCA 1984)..... 12

Gordon v. State,
608 So. 2d 800 (Fla. 1992)..... 12

In re: Rawson Food Svs., Inc.,
846 F.2d 1343 (11th Cir. 1988)..... 30, 31

Jackson v. Seaboard Coast Line R.R. Co.,
678 F.2d 992 (11th Cir. 1982)..... 29

Johansen v. Combustion Eng'g, Inc.,
170 F.3d 1320 (11th Cir. 1999) 15, 16

Lynn v. Feldmeth,
894 So. 2d 481 (Fla. 2d DCA 2003) 12

New York, L.E. & W. R. Co. v. Estill,
147 U.S. 591 (1893) 15

Order of R.R. Tele. v. Ry. Express Agency, Inc.,
321 U.S. 342 (1944) 21

Paul v. Holbrook,
696 So.2d 1311
(Fla. Dist. Ct. App. 1997) 14

Phillips v. Smalley Maintenance Serv., Inc.,
711 F.2d 1524 (11th Cir. 1983) 26

Rainone v. Potter,
388 F. Supp. 2d 120 (E.D. N.Y. 2005) 26

Reiter v. Metropolitan Transp. Auth. of New York,
2003 WL 22271223 (S.D. N.Y. 2003) 26

Ross v. Rhodes Furniture, Inc.,
146 F.3d 1286 (11th Cir. 1998) 16, 17, 37

Rush v. Scott Specialty Gases, Inc.,
113 F.3d 476 (3d Cir. 1997) 21, 22

Sabatino v. Curtiss Nat'l Bank of Miami Springs,
448 F.2d 1046 (5th Cir. 1971) 12

Smith's Bakery, Inc. v. Jernigan,
134 So.2d 519 (Fla. 1st DCA 1961) 12

State Farm Mut. Auto Ins. Co. v. Campbell,
538 U.S. 408 (2003) .....*passim*

Therrell v. Ga. Marble Holdings Corp.,
960 F.2d 1555 (11th Cir. 1992)..... 14

TXO Production Corp. v.
Alliance Resources Corp.,
509 U.S. 443 (1993) 19

United States v. Frazier,
387 F.3d 1244 (11th Cir. 2004)
(*en banc*)..... 36, 37

United States v. Mock,
523 F.3d 1299 (11th Cir. 2008)..... 37

United States v. Renfro,
620 F.2d 497 (5th Cir. 1980)..... 37

Walia v. Vivek Purmasir & Assoc., Inc.,
160 F. Supp. 2d 380 (E.D. N.Y. 2000)..... 26

Weaver v. African Methodist Episcopal Church,
54 S.W.3d 575 (Mo. Ct. App. 2001)..... 39-40

Wilkerson v. Grinnell Corp.,
270 F.3d 1314 (11th Cir. 2001)..... 29

Wilson v. Taco Bell of Am.,
917 So.2d 1223 (La. Ct. App. 2005) 26

Wright v. Hollingsworth's Lessee,
26 U.S. 165 (1828) 28, 32

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. VII ..... *passim*

U.S. CONST. amend. VIII 6

STATUTES

42 U.S.C. § 2000e, *et seq.* 2

42 U.S.C. § 2000e-5(b) 29

42 U.S.C. § 2000e-5(e) 33

Chapter 760, Florida Statutes 2, 33

Fla. Stat. § 448.101-105 2

Fla. Stat. § 760.11(a) 33

Fla. Stat. § 766.207 12

Fla. Stat. § 766.208 12

Fla. Stat. § 768.72(2) 11

Fla. Stat. § 768.73 11

Fla. Stat. § 768.73(1)(a) 5, 11, 13, 15

Fla. Stat. § 768.73(1)(c) 11, 13

Fla. Stat. § 768.73(1)(d) 11

Fla. Stat. § 796.09 2

Title VII of the Civil Rights Act of 1964 .... 2, 4, 21, 33

RULES

Sup. Ct. R. 10 ..... 7, 8, 9, 38

Sup. Ct. R. 14.1(a) 38

Sup. Ct. R. 15 5

Fed. R. Civ. P. 9(c) 29, 30

Fed. R. Civ. P. 12(b)(6) 31

Fed. R. Civ. P. 49 15

Fed. R. Civ. P. 50 34

Fed. R. Civ. P. 50(a) 16, 17, 32, 34

Fed. R. Civ. P. 50(b) 17

Fed. R. Civ. P. 51 17

OTHER AUTHORITY

Restatement (Second) of Torts § 908 (1977) 27

STATEMENT OF THE FACTS

A. Factual Background

Plaintiff sued her former employer, Central Florida Investments, Inc., ("CFI") and its CEO, alleging various wrongs, including federal and state statutory claims for sexual harassment and a common law battery claim. (App. 13a).[1]

Ultimately, Plaintiff tried her harassment and battery claims. (App. 15a). During the trial she testified to conduct spanning the entire period of her employment with CFI, dating from early 1995 and ending in 2000. (App. 3a-13a).

On her Title VII claim, the jury found that none of the alleged acts of harassment took place on or after September 15, 2000, the point at which the statutory limitations period barred recovery. (App. 15a). On her battery claim, the jury found that two acts Plaintiff testified to occurred within the statute of limitations, in a 117-day period. (App. 16a). The jury awarded Plaintiff $102,223.14 in compensatory damages and $5,276,640 in punitive damages. (App. 16a). The District Court entered judgment on the verdict in that amount. *Id.*

After hearing post-trial motions, the District Court entered an Amended Judgment that Plaintiff take nothing from Defendants on her claims under

---

[1] Defendants adopt the Appendix attached to the Cross Petition in lieu of reproducing the opinions contained therein. However, a cursory review of the Appendix reveals obvious errors in the reproduction of the opinions contained therein.

Title VII or the Florida Civil Rights Act ("FCRA"), but that she recover $103,622.09 in compensatory damages, as well as $506,847.75 in punitive damages on her common law battery claim. (App. 17a).

B. Procedural Background

1. The District Court: Removal and Summary Disposition

Defendants timely removed Plaintiff's original action to the United States District Court for the Middle District of Florida from the Circuit Court of the Ninth Judicial Circuit of Orange County, Florida. (App. 14a).

Plaintiff thereafter filed a nine count Second Amended Complaint. The amended claims included sexual harassment under Title VII, 42 U.S.C. §2000e, *et seq.* and the FCRA, Chapter 760, Florida Statutes; retaliation under Title VII and the FCRA; retaliation in violation of the Florida Private Whistleblower Act "(Whistleblower"), §448.101-105, Fla. Stat.; and Florida common law claims of negligent retention and supervision, false imprisonment and battery, and a state statutory claim for inducement to prostitution, §796.09, Fla. Stat. (App. 14a).

The District Court dismissed Plaintiff's Whistleblower, inducement to prostitution and negligent retention and supervision claims, and eventually granted Defendants summary judgment on the remaining claims of sexual harassment and

retaliation. (App. 14a, 15a). The Court remanded the battery and false imprisonment claims to state court. (App. 15a).

2. The first appeal to the Eleventh Circuit and first Petition for Writ of Certiorari to this Court

Plaintiff appealed the summary disposition to the Eleventh Circuit, which affirmed, in part, and vacated, in part, finding principally that Plaintiff had presented sufficient evidence to get to trial on her hostile work environment claims. *Id.* The Eleventh Circuit also reinstated Plaintiff's state-law battery and false imprisonment claims. *Id.*

Thereafter, Plaintiff filed a Petition for Writ of Certiorari in this Court, challenging both the District Court's summary disposition of her statutory tangible employment action and retaliation claims and the Eleventh Circuit's ruling affirming the District Court. This Court denied Plaintiff's Petition for Writ of Certiorari in Case No. 07-660, on February 25, 2008.

3. The Post-Trial Proceedings

The parties filed various post-trial motions. While the District Court denied several of these motions, the Court determined the jury had not made the required findings under state law to support a punitive damages award greater than $500,000 and that the judgment should reflect Defendants had prevailed on the sexual harassment claim. (App. 17a).

On these bases, the District Court entered an Amended Judgment stating Plaintiff "shall take nothing" on the Title VII of the Civil Rights Act of 1964 and FCRA claims and reducing the punitive damage award by $4,776,640.00, to $500,000.00. *Id.* Augmented by interest, the Amended Final Judgment awarded Plaintiff compensatory damages of $103,622.09 and punitive damages of $506,847.75 and a total judgment of $610,469.84. *Id.*

4. The second appeal to the Eleventh Circuit and second Petition for Writ of Certiorari to this Court

Both Defendants and Plaintiff appealed the Amended Judgment to the Eleventh Circuit. *Id.* Plaintiff never argued any Seventh Amendment violation. The Eleventh Circuit affirmed the Amended Judgment in all respects, (the "Opinion"). (App. 1a-61a). Only in Plaintiff's Petition for Rehearing and for Rehearing *En Banc* ("Rehearing Petition") did she even mention the Seventh Amendment. The Eleventh Circuit denied Plaintiff's Rehearing Petition (App. 146a), as well as Defendants' Petition for Rehearing.

Defendants have filed a Petition for Writ of Certiorari in this Court in Case No. 10-35. Defendants have challenged the Opinion because it conflicts with decisions of the Second and Third Circuits because the Opinion leaves standing a punitive damages award based on time-barred conduct and because the Opinion conflicts with this Court's rulings on two of the three "guideposts" for

evaluating the appropriateness of a punitive damages award.

C. Objections to Petitioner's Statement of the Case

In compliance with Sup. Ct. R. 15, Defendants challenge the accuracy of the following statement characterized as fact in the Cross-Petition:

> Plaintiff claims that "even in post-trial motions, Defendants never mentioned the $500,000 state statutory cap that the court held to apply . . ." (Cr. Pet. p. 2).

However, Defendants' Motion for Remittitur expressly argued that the punitive damage award could not exceed $500,000 pursuant to §768.73(1)(a):

> Florida limits punitive damage awards. *See* §768.73, Fla. Stat. Abominable conduct merits three (3) times compensatory damages of $500,000, while egregious conduct motivated solely by greed, something not proven here, earns a multiple of four (4) times compensatory damages or $2,000,000. Only conduct specifically intended to cause physical injury, likewise not proven here, avoids the cap. (Doc. 252, p. 15 n.8).

REASONS FOR DENYING WRIT

I. THIS COURT SHOULD DENY THE WRIT BECAUSE PLAINTIFF'S SEVENTH AMENDMENT ARGUMENT WAS NOT PROPERLY PRESERVED.

When a petitioner fails to raise an argument before either the District Court or the Court of Appeals, this Court refuses to consider it. This is true even when the unpreserved argument is constitutional in nature. *See Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989).

In *Kelco Disposal, Inc.*, a defendant appealed a District Court's order upholding a jury's $6 million punitive damages award in an antitrust case. *Id.* The Court of Appeals affirmed as to both liability and damages holding that even if the Eighth Amendment were applicable, the punitive damages awarded were not so disproportionate as to be constitutionally excessive. *Id.* In their petition to this Court, petitioners argued that the punitive damages award violated their due process rights. *Id.* at 270.

This Court held that "because petitioners failed to raise their due process argument before either the District Court or the Court of Appeals, and made no specific mention of it in their petition for certiorari in this Court, we shall not consider the effect on this award." *Id.* at 277. Though *Kelco* petitioners claimed that the due process question was within the "clear intendment" of the objection it

made throughout the proceedings, this Court refused to assume that a nonconstitutional argument also included a constitutional one. *Id.*

Plaintiff has simply not preserved this new Seventh Amendment violation argument because she did not raise it in either the District Court, or in her Cross Appeal in the Eleventh Circuit. Plaintiff raised the Seventh Amendment for the first time in her Rehearing Petition. This Court should maintain this doctrine refusing jurisdiction in cases where the argument has not been preserved.

II. THE ELEVENTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S RULING THAT PUNITIVE DAMAGES SHOULD BE CAPPED UNDER FLORIDA LAW AT $500,000, WHERE THE JURY FAILED TO FIND THAT DEFENDANTS SPECIFICALLY INTENDED TO HARM PLAINTIFF AND DEFENDANTS' CONDUCT DID IN FACT HARM PLAINTIFF AND WHERE THE AMOUNT OF THE JURY'S PUNITIVE DAMAGES AWARD EXCEEDED THAT PERMITTED BY LAW.

Rule 10 of the Rules of the Supreme Court states:

> Review on a writ of certiorari is not a matter of right but judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the

> Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ;
>
> * * *
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup. Ct. R. 10. As we show in the next several sections of this Brief, Plaintiff has failed to give this Court reason to exercise its considerable discretion for either reason.

This Court frequently uses its discretionary certiorari jurisdiction to resolve conflicts among circuit courts of appeals and state courts concerning the meaning of provisions of federal law. *See Braxton v. U.S.*, 500 U.S. 344 (1991). But again, as we show hereafter, Plaintiff has made no such case here.

Turning to those propositions Plaintiff vainly advances in her Cross-Petition, Plaintiff, for the third time, claims she is entitled to uncapped punitive damages, even though the jury's verdict omitted the requisite findings under Florida law to support unlimited punitive damages. Plaintiff goes to extraordinary lengths to contort and twist the law. Each of Plaintiff's claims here is based on an alleged Seventh Amendment violation. In her first claim, Plaintiff complains the Eleventh Circuit disagreed with her unfounded contention that the verdict form her lawyer approved impliedly included the missing statutorily mandated findings that were needed to support the original punitive damages verdict and that CFI's pre-verdict failure to object to a verdict form with which it was plainly satisfied waived its post-verdict challenge to the punitive damages award. (Cr. Pet. p. 3-6). However, this case presents nothing more than Plaintiff's grumblings that the jury's decision did not include the factual findings Plaintiff herself should have sought, but did not, coupled with Plaintiff's serial misapplications of properly stated rules of law. *See* Sup. Ct. R. 10.

Defendants did not seek punitive damages below – Plaintiff did. Plaintiff, not Defendants,

carried the burden below to show Defendants' specific intent to harm coupled with actual harm to Plaintiff as part of her prima facie case to overcome the statutory punitive damages cap. To accomplish this, Plaintiff needed a specific jury instruction and a specific verdict form. Not only did Plaintiff fail to ask for either, Plaintiff did not object to the instructions or the verdict form which omitted these specific findings. The jury did not make the necessary findings to overcome Florida legislature's presumption of excessiveness. The District Court and the Eleventh Circuit applied applicable Florida law and the punitive damages cap. Plaintiff now argues that she suffered a constitutional impairment when Defendants declined to object to jury instructions with which they were satisfied and a verdict form that assured them that any adverse punitive damages award would not exceed $500,000. To recite Plaintiff's argument aloud reveals its infirmity.

Under Florida law, a defendant cannot be held liable for punitive damages unless the trier of fact, based on clear and convincing evidence, finds such defendant personally guilty of intentional misconduct or gross negligence. (App. 29a). "Intentional Misconduct" means:

> (a) . . . that the Defendants had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued

> that course of conduct, resulting in injury or damage.

Id. (citing to §768.72(2), Fla. Stat.).

The Eleventh Circuit correctly ruled that the District Court was empowered to remit the punitive damages award if it determined it was unreasonable. (App. 30a) (citing to §768.73(1)(d), Fla. Stat.). Florida's courts are required to conduct this review in order "to make certain that the manifest weight of the evidence does not render the amount of punitive damages assessed out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct. (App. 30a) (citing to *Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1263 (Fla. 2006)).

Under Florida law, punitive damages also are subject to a statutory cap: "an award of punitive damages may not exceed the greater of: 1. Three times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or 2. The sum of $500,000." (App. 30a) (citing to §768.73(1)(a), Fla. Stat.). For a punitive award greater than $500,000 a Florida jury must have determined and rendered specific findings that: "at the time of injury the Defendants had a specific intent to harm the claimant and determines that the Defendants' conduct did in fact harm the claimant, there shall be no cap on punitive damages." (App. 32a) (citing to §768.73(1)(c), Fla. Stat.) (emphasis added). A legitimate object of §768.73 is to discourage punitive

damages claims. *Gordon v. State*, 608 So.2d 800, 801 (Fla. 1992).

A plaintiff generally has the burden to prove each material fact essential to recovery. *Smith's Bakery, Inc. v. Jernigan*, 134 So.2d 519 (Fla. 1st DCA 1961). This burden never shifts. *Sabatino v. Curtiss Nat'l Bank of Miami Springs*, 448 F.2d 1046 (5th Cir. 1971). Under Florida law, a statutory cap is not an affirmative defense because a cap does not, wholly or partially, bar or void a cause of action. *See Lynn v. Feldmeth*, 894 So.2d 481, 483 (Fla. 2d DCA 2003). (statutory cap of motor vehicle owner's liability regarding damages caused by permissive user of vehicle is not an affirmative defense); *Cohen v. DeYoung*, 655 So.2d 1265, 1267 (Fla. 5th DCA 1995) (damages cap set forth in §766.207 and §766.208, Fla. Stat., were primarily a limitation in damages and not a defense to the suit or a condition which had to be met prior to filing suit).

Florida courts condition a plaintiff's recovery upon a jury's express finding supporting the claim. *See Globe Sec. Sys. Co. v. Mayor's Jewelers, Inc.*, 458 So.2d 828, 829-30 (Fla. 3d DCA 1984). *Ault v. Lhor*, 538 So.2d 454, 455-56 (Fla. 1989) (where the Florida Supreme Court, while addressing questions certified by the Eleventh Circuit Court of Appeals, approved an award of punitive damages "upon the express finding of liability by the fact finder"). Where a statute requires specific findings, the verdict form must contain these findings. *See Cabas-Torres v. State*, 502 So.2d 67, 68 (Fla. 3d DCA 1987) (holding that a verdict failing to contain specific findings could not support the trial court's statutory

reclassification). The statute does not permit these findings to be inferred – the statute requires that these findings be expressly made.

The District Court noted that it first had to "determine whether the jury's verdict is within the confines set by state law." (App. 98a) (citing to *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 435 (1996) (quoting *Kelco Disposal, Inc.*, *supra* at 279)).

The Court made the obvious finding dictated by the record that the jury did not make the requisite findings under §768.73(1)(c) to support unlimited punitive damages, and said:

> Although Plaintiff asserts in her opposition memorandum that the jury made the requisite findings under §768.73(1)(c) to support an unlimited punitive damages award, the jury did not do so. The jury was instructed, in accordance with the Florida standard jury instruction on this issue that it should *consider* whether [CFI's CEO] "had a specific intent to harm the Plaintiff and [whether] the conduct of [CFI's CEO] did in fact harm the Plaintiff" (Doc. 232, p. 24), but the verdict form does not indicate that the jury made either of these findings. Absent such findings, under the plain terms of the statute, the award is subject to the cap in §768,73(1)(a) --

> $500,000. (alteration in original). (App. 111a, 112a).

The Court also expressly found that Plaintiff's counsel did not object to the verdict form with regard to punitive damages, and that the verdict form Plaintiff herself proposed before trial (Doc. 207) did not ask the jury to make these findings. (App. 112a). Plaintiff clearly failed to enable the jury's ability to award uncapped punitive damages. *See Therrell v. Ga. Marble Holdings Corp.*, 960 F.2d 1555 (11th Cir. 1992) (affirming district court where neither party demanded that the statute of limitations issue be presented to the jury. They, therefore, consented to the court acting as trier of fact on this issue, and the court ruled on the issue as a trier of fact). When the District Court rejected Plaintiff's claim to uncapped punitive damages in the absence of these findings, it did nothing more than apply a plainly written Florida statute. *Id.*

The Eleventh Circuit agreed that the jury unquestionably did not make any such overt factual findings as none of the eight questions on the verdict form addressed specific intent to harm or actual harm. (App. 33a n.6, 34a). There was "no natural reading of the verdict alongside the jury instructions" that yielded the conclusion that the jury made the requisite findings. (App. 35a). The instructions made clear a civil battery might be supported where Defendants had specific intent to ***offend***, not harm, and where Defendants effected an ***offensive***, but not harmful, contact. *Id.* (citing to *Paul v. Holbrook*, 696 So.2d 1311, 1312 (Fla. Dist. Ct. App. 1997)). The Court observed "it can hardly

be said that the findings of specific intent to harm and actual harm inhere in a jury verdict of civil battery." (App. 35a). Plaintiff, who bore the burden of proof on the issue, never requested and the District Court never instructed the jury it must find specific intent to harm or actual harm. (App. 36a).

The District Court anticipated Plaintiff's constitutional flag-waiving, noting that because Plaintiff's punitive damages could not exceed $500,000 as a matter of state law, its decision was not a "traditional remittitur" and the Seventh Amendment right to a jury trial was not implicated by the reduction. (App. 123a n. 20) (collecting cases).

The Eleventh Circuit approved the District Court's application of the statutory cap on its own volition: "'where a portion of a verdict is for an identifiable amount that is not permitted by law, the court may simply modify the jury's verdict to that extent and enter judgment for the correct amount.'" (App. 36a) (citing to *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1330 (11th Cir. 1999) (citing *New York, L.E. & W. R. Co. v. Estill*, 147 U.S. 591 (1893)); and *Kelco Disposal, Inc.*, *supra* at 279). The Eleventh Circuit ruled the Florida statute does not require a motion by the aggrieved party. §768.73(1)(a), Fla. Stat. Consequently, whether Defendants moved for application of the statutory cap was of no moment. (App. 36a).

Plaintiff cites to *Fredonia Broadcasting Co., Inc. v. RVA Co.*, 481 F.2d 781, 796 (5th Cir. 1973) "when the verdict form is silent on an issue, Rule 49 requires that findings in accord with the judgment

rendered on that issue are deemed to have been made". (Cr. Pet. p. 3). For the reasons stated in the Opinion, cited above, the Eleventh Circuit discerned no similarity between the instant case and *Fredonia*.

Next, Plaintiff contends that *Johansen* (properly cited by the Eleventh Circuit for the proposition that a court may simply modify a jury's verdict to the extent it is not permitted by law) has no application here because *Johansen* is limited to verdicts which are excessive *per se*. (Cr. Pet. p. 4). Plaintiff cites no authority for such a restrictive reading of *Johansen*. Had such a limitation been intended, the Eleventh Circuit in particular should have known of it, given that it decided *Johansen*.

Plaintiff then offers *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286, 1289 (11th Cir. 1998) as a Seventh Amendment restraint of the modification of a jury's verdict "simply because a party has saved up its objections to the verdict to be sprung after losing." (Cr. Pet. p. 5). *Ross* is simply inapposite, as the Eleventh Circuit was surely aware given that it decided *Ross*. In *Ross*, defendant moved for judgment as a matter of law both at the close of plaintiff's case and at the close of all the evidence. *Id.* at 1289. The parties did not, however, identify on appeal what grounds defendant offered in support of its pre-verdict motions under Rule 50(a). *Id.* The District Court granted defendant's renewed motion for judgment as a matter of law, but the Eleventh Circuit reversed because the record on appeal prevented the appellate court from any meaningful review of whether plaintiff's Seventh Amendment privileges were abridged. *Id.*

The instant case is entirely different. Defendants' Motion To Dismiss; Answer and Affirmative Defenses; Motion for Summary Judgment; and Rule 50(a) Motion all expressly raised the untimeliness argument (App. 69a-71a). Plaintiff apparently chose not to put on all of her evidence regarding timeliness in her case in chief. Moreover, even after Defendants raised the timeliness argument in their Rule 50(a) Motion, Plaintiff still failed to ask the District Court to reopen the case to put on additional evidence. The *Ross* decision itself notes that this would defeat any claim that Seventh Amendment rights were "ambushed." The Court stated:

> When reviewing a trial court's resolution of a Rule 50(b) Motion, we compare the grounds originally argued by the Movant in its Rule 50(a) Motion with those cited by the trial court in granting a renewed motion for judgment as a matter of law. (citations omitted). If the grounds argued in a motion under Rule 50(a) are "closely related" to those argued in a Rule 50(b) Motion, then setting aside a jury's verdict is no surprise to the nonmovant. *No Seventh Amendment right is ambushed.* (citations omitted) (emphasis added).

As she did on appeal, Plaintiff cites to *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999) for the holding that Rule 51 requires a party to object to a jury instruction or jury verdict

form prior to jury deliberations to preserve the issue on appeal. (Cr. Pet. p. 6). For the reasons stated in the Opinion above, the Eleventh Circuit determined that, as with *Fredonia*, *Farley* did not support Plaintiff on appeal.

Plaintiff is simply dissatisfied with the Eleventh Circuit's Opinion (and the District Court's decision) and its application of the accepted legal principles to the record before it. The Seventh Amendment did not prohibit the District Court from applying the statutory cap both because Plaintiff failed to object to the instructions and verdict form and because the $5,276,640 punitive damage award was simply not permitted by law. Plaintiff's claim does not possess constitutional attributes that would justify this Court's certiorari review.

III. THE ELEVENTH CIRCUIT'S OPINION, THAT THE DISTRICT COURT CORRECTLY CAPPED PUNITIVE DAMAGES AT $500,000, IS FURTHER SUPPORTED UNDER A FEDERAL DUE PROCESS ANALYSIS.

Even without considering either Florida's statutory punitive damages cap (the legality of which has not been effectively demonstrated by Plaintiff) or Plaintiff's unprecedented claim that the District Court's application of that cap violated the Seventh Amendment, this Court should decline jurisdiction of the Cross Petition because separate and distinct federal due process considerations prohibit punitive damages in excess of $500,000.

While states may legislate restraints over the imposition of punitive damages, there are, beyond the statutory scheme, procedural and substantive constitutional limits in punitive damages. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). The amount of punitive damages may not exceed the *lowest* amount reasonably necessary to achieve retribution and deterrence. *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416-20 (2003).

The foundation of the due process inquiry for punitive damages is found in *BMW*, which established three "guideposts" to determine when an award is appropriate or grossly excessive. These three guideposts are: "the degree of reprehensibility"[2] of the Defendants' actions; "the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *BMW* at 574-75.

To determine the wrongdoer's reprehensibility a court must consider whether: (1) the harm was physical or economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the

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[2] The reprehensibility required for harsh punitive damages entails a high degree of culpability. *BMW*, *supra*, at 580. The Court implied (as in *TXO*) the misconduct should be intentional, perhaps gravely deplorable, deserving the harshest punitive damages would be odious. It would pass moral bounds, be wicked or outrageous, and constitute a grave offense against right or decency, which two instances of battery alone do not support.

health or safety of others; (3) the target had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm resulted from intentional malice, trickery or deceit, or mere accident. *State Farm*, 538 U.S. at 419.

"Elementary notions of fairness enshrined in our constitutional jurisprudence, dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 574; *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964) (there is a "potentially greater deprivation of the right to fair notice . . . where . . . a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness situation'").

A key procedural mechanism for ensuring notice, and concomitantly for protecting against severe punishments, is the limitations period for a claim. Statutes of limitations

> promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared . . . *even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.*

Order of R.R. Tele. v. Ry. Express Agency, Inc., 321 U.S. 342 (1944) (emphasis added).

Defendants have already argued in their July 2, 2010 Petition for Writ of Certiorari, that even the statutorily capped punitive damages of $500,000 were constitutionally excessive. Subsumed within that argument is the more obvious argument that punitive damages could not have exceeded $500,000 under a federal due process analysis.

Because the statute of limitations under Title VII and the Florida Civil Rights Act ("FCRA") barred Plaintiff's claim, the jury did not reach the issue of damages on her sexual harassment claims. Evidence introduced at trial relating to Plaintiff's time-barred statutory sexual harassment claims, however, infected the jury's deliberations and ultimately influenced the amount of punitive damages awarded on her common law battery claim. That same time-barred evidence precipitated the already unconstitutionally excessive $500,000 award. Punitive damages should never have even approached $500,000 because that sum necessarily, and impermissibly, included punitive damages based on conduct which was separate from the two acts the jury concluded were a battery and were not actionable.

In *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 477-78 (3d Cir. 1997), the Third Circuit ruled that the presence of a time-barred claim and the introduction of evidence related to and supporting it "infected" the jury's verdicts on liability on the other timely claims and on the damages

award. *Id.* at 484-85. The Court explained that it had:

> no intention of shredding the 300-day limitations period by automatically allowing an employee who alleges actionable conduct . . . to make claims with respect to any adverse employment actions that occurred during his or her entire period of employment.

Id. On this reasoning, the *Rush* Court concluded that when "[i]t is not possible to ascertain what portions of the compensatory and punitive damages awards were attributable" to claims that were time-barred, the damages awards must be vacated. *Id.*

The Second Circuit in *Annis v. County of Westchester*, 136 F.3d 239 (2d Cir. 1998) followed *Rush* and vacated a punitive damages award in a sex discrimination suit. The Court explained that jury confusion and prejudice to the defendants far outweighed the probative value of the time-barred evidence of sexual harassment. The Second Circuit held that if a court cannot determine what portion of a punitive damages award is attributable to time-barred claims, the damages awards must be vacated. *Id.* at 248.

The District Court concluded that the entirety of Siegel's conduct – not just the battery actually proven – was at the "low to middle range of the reprehensibility scale." (App. 115a). Plaintiff was never treated for any physical or emotional injuries

as a result of the battery. There was no evidence that Defendants' conduct evinced an indifference or reckless disregard of Plaintiff's *physical health* or safety. The non-time-barred evidence of the battery consisted of two incidents lasting a few seconds. No clear and convincing evidence proved that such conduct demonstrated a high probability that an actual injury to Plaintiff would result.

The *State Farm* factors make clear that a heightened award was not justified. *See State Farm*, 538 U.S. at 419 (the presence of a single factor involved in the reprehensibility analysis may not warrant punitive damages); *Bridgeport Music, Inc. v. Justin Combs Publ'g.*, 507 F.3d 470, 487 (6th Cir. 2007) ("where only one of the reprehensible factors is present, a ratio in the range of 1:1 to 2:1 is all that due process will allow"); *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 499 F.3d 184, 191-92 (3d Cir. 2007) (punitive damages award reduced in part because harm was economic and only three reprehensibility factors were present); *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 155-57 (6th Cir. 2007) (reducing $2.2 million punitive damages award to $400,000, the amount of the compensatory damages award, where only one reprehensibility factor present); *Clark v. Chrysler Corp.*, 436 F.3d 594, 608 (6th Cir. 2006) (reducing $3 million punitive damages award to $471,258.26, an amount twice the compensatory award, where the defendant's conduct was not highly reprehensible).

As the Eleventh Circuit's noted, due process prevented Plaintiff from recovering more than $500,000 even without considering Florida's

statutory punitive damages cap. The Eleventh Circuit refused to award Plaintiff more than $500,000 for punitive damages, even after the Eleventh Circuit went beyond the procedural and substantive limitation *BMW* and *State Farm* place on punitive damages awards.

Moreover, as Defendants have argued in their Petition for Writ of Certiorari, the $500,000 punitive damage award also ran afoul of *BMW* and *State Farm* because the punitive damages to compensatory damages ratio of nearly 5:1 exceeds constitutional bounds.

In *State Farm*, this Court significantly redefined the conduct that a state may subject to punitive damages liability, and pointedly clarified the rigorous three-guidepost analysis the Court established in *BMW*, offering highly structured guidance on the outer limits of punitive damages awards. *State Farm*, 538 U.S. 408. In *BMW*, the Court made clear that "exemplary damages must bear a 'reasonable relationship' to compensatory damages." *BMW*, 517 U.S. at 580. *State Farm* went one step further and made clear that "the conduct must have a nexus to the specific harm suffered by the plaintiff." 538 U.S. at 422. The second *BMW* guidepost, therefore, focuses a court's analysis on that nexus, on the "relationship between the penalty and the harm to the victim caused by the Defendants' actions," *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001).

The "most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *Id.* Although this Court in *TXO* upheld a punitive award where "the relevant ratio was not more than 10 to 1," *BMW*, 517 U.S. at 581 the Court also has stated that a punitive damage award of four times the amount of compensatory damages (4 to 1) is "close to the line" in terms of constitutional propriety. *Id.*

The punitive damages award here is already beyond the line. At an unreasonable or excessive ratio of nearly 5 to 1, the award does not reflect the actual harm occasioned by just two incidents of battery in a 117-day period. After all, the compensatory damages award did not redress the type of physical harm ordinarily suffered in a battery, as Plaintiff suffered none. The compensatory damage award was, as the Eleventh Circuit described it, an "award for emotional damages equal to" Plaintiff's annual income. (App. 22a, 23a). While there is no formulaic approach to computing such damages, it is inconceivable that the "emotional harm, emotional damages and emotional suffering" Plaintiff endured as the result of just two incidents of battery comprising, at best, a few seconds of contact caused $102,223.14 in harm.

There is little doubt that for the harm occasioned by the two instances of battery, the compensatory damages are substantial. *See, e.g., Bach, supra,* at 156-57 (holding $400,000 compensatory damage award was "substantial" and remitting $2.2 million punitive damage award to

$400,000). In cases involving only slight physical touching, compensatory damages have ranged from $0 to $35,000.[3] In cases involving emotional distress which resulted from conduct that did not cause physical injury, compensatory damages have ranged from $5,000 to $75,000. These cases, in contrast to this case, presented documented and corroborated emotional injury or psychological harm. Even then awards have been modest.[4]

In *State Farm*, this Court said "an application of the *BMW* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (which already contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages." *State Farm*, *supra*, at 429. Explaining further:

> The compensatory damages for the injury suffered here, moreover, likely were based on a component which was *duplicated in the punitive award. Much of the distress was caused by the outrage*

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[3] *See Phillips v. Smalley Maintenance Serv., Inc.*, 711 F.2d 1524 (11th Cir. 1983); *Rainone v. Potter*, 388 F. Supp. 2d 120 (E.D. N.Y. 2005); *Wilson v. Taco Bell of Am.*, 917 So.2d 1223 (La. Ct. App. 2005); *Walia v. Vivek Purmasir & Assoc., Inc.*, 160 F. Supp. 2d 380 (E.D. N.Y. 2000); and *Beard v. Flying J., Inc.*, 266 F.3d 792 (8th Cir. 2001).

[4] *See Franceschi v. Hosp. Gen. San Carlos, Inc.*, 326 F. Supp. 2d 257 (D. P.R. 2004); *Reiter v. Metropolitan Transp. Auth. of New York*, 2003 WL 22271223, at *11 (S.D. N.Y. 2003); *Rainone*, *supra*, at 124-26; *and Bernstein v. Sephora*, 182 F. Supp. 2d 1214, 1226-29 (S.D. Fla. 2002).

> *and humiliation the Campbell's suffered at the actions of their insurer;* and it is major role of punitive damages to condemn such conduct. *Compensatory damages, however, already contain this punitive element. See* Restatement (Second) of Torts §908, Comment c, p. 466 (1977) ("*In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both*"). (emphasis supplied).

Id. at 426. Given the attenuated nexus between Defendants' conduct and the harm Plaintiff actually suffered, the ratio (between the compensatory and punitive damages) is excessive and should not have exceeded a ratio of 1:1. Under no analysis could it be said that the 4.89:1 ratio here should have been exceeded. This Court should accordingly decline to accept jurisdiction because federal due process considerations prohibit a punitive damages award in excess of $500,000 notwithstanding all of Plaintiff's arguments.

IV. THE ELEVENTH CIRCUIT'S OPINION, THAT THE DISTRICT COURT DID NOT ABUSE ITS SOUND DISCRETION BY FINDING THAT DEFENDANTS' AFFIRMATIVE DEFENSES WERE SUFFICIENTLY PARTICULAR IN DENYING THE TIMELINESS OF PLAINTIFF'S EEOC COMPLAINT, DID NOT VIOLATE THE SEVENTH AMENDMENT OR RUN AFOUL OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Plaintiff next claims that the Eleventh Circuit erred in allowing a "statute of limitations" question on the verdict form. (Cr. Pet. p. 6-9). At its bottom, Plaintiff's argument is that the District Court abused its sound discretion in finding that Defendants' affirmative defenses were sufficiently particular in denying the timeliness of Plaintiff's EEOC complaint. This point inappropriately seeks an academic opinion from this Court, proclaiming, without discernible reason, the District Court's factual findings as erroneous and both lower courts' application of correctly stated principles of law to those facts as wrong.

In *Wright v. Hollingsworth's Lessee*, 26 U.S. 165, 167 (1828), this Court held:

> The allowances and refusal of amendments in the pleadings – the granting and refusing new trials; and most of the other incidental orders, made in the progress of a cause, before trial, are matters *so peculiarly*

> *addressed to the sound discretion of the Courts of original jurisdiction, as to be fit for their decision only, under their own rules and modes of practice. This Court has always declined interfering in such case.* (emphasis added).

The filing of a complaint with the EEOC is a condition precedent to a sexual harassment suit. (App. 52a) (citing to *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1317 (11th Cir. 2001); and 42 U.S.C. §2000e-5(b) (App. 52a)). "In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity." (App. 52a) (citing to Rule 9(c), Fed.R.Civ.P.). If a defendant makes that denial, "[t]he plaintiff then bears the burden of proving that the conditions precedent, which the Defendant has specifically joined in issue, have been satisfied." (App. 52a) (citing to *Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1010 (11th Cir. 1982)).

Plaintiffs Second Amended Complaint (¶ 9) alleged: "Plaintiff received her Notice of Right to Sue letter from the U.S. Equal Employment Opportunity Commission within 90 days before filing this action, and has otherwise fulfilled all conditions precedent to institution of this action." (App. 53a).

Defendants first directly denied Plaintiffs' satisfaction of conditions precedent: "Defendants deny the allegations contained in paragraph 9 of the

Plaintiff's Second Amended Complaint." (App. 54a). Defendants then amplified such denial in their affirmative defenses:

> 338. Plaintiff failed to exhaust all administrative remedies and thus cannot obtain relief pursuant to Title VII or the Florida Civil Rights Act, Chapter 760.
>
> 339. Plaintiff did not exercise her right to sue or to file her EEOC Complaint within the time prescribed by the statute.

(App. 52a). The Eleventh Circuit ruled the affirmative defenses stated which particular condition precedent Defendants claimed Plaintiff failed to fulfill (the EEOC complaint), and the reason for the failure (untimeliness). (App. 55a). Consequently, the Eleventh Circuit ruled that CFI's denial was sufficiently particular. *Id.*

Technical noncompliance with pleading requirements are excused where the substance of the pleading is sufficient. (App. 55a) (citing to *In re: Rawson Food Svs., Inc.*, 846 F.2d 1343, 1349 n.9 (11th Cir. 1988); and *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981)). The Eleventh Circuit found that Defendants' Answer gave Plaintiff ample notice that Defendants believed Plaintiff had failed to timely file a complaint with the EEOC, which notice served to discharge Defendants' duty under Rule 9(c) and successfully shifted to Plaintiff

the burden of presenting evidence of timeliness, which she failed to do. (App. 55a).

Plaintiff cites to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) for the straightforward proposition that "factual [averments] must be enough to raise a right to relief above the speculative level . . . '[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right.'" (internal citation omitted). (Cr. Pet. p. 8). The Eleventh Circuit's ruling is in complete accord with *Twombly* and *Ashcroft v. Igbal*, 129 S. Ct. 1937, 1953 (2009) (Cr. Pet. p. 8).

The omniscience with which Plaintiff cloaks herself peaks with her wild claim that the Eleventh Circuit once again misread another of its own cases: *In re Rawson Food Svs., Inc., supra.* Defendants, in contrast, accord the Eleventh Circuit the respect it is due; we presume that the Eleventh Circuit knew what its opinion, and the following language, meant: "the defense Rawson raises is not an affirmative defense, but rather is a general defense akin to a Fed.R.Civ.P. 12(b)(6) motion for failure to state a claim upon which relief can be granted. Despite the mislabeling of the defense, its substance correctly points to a fatal flaw in Flav-O-Rich's claim – the failure to allege possession." Defendants' pleading, quoted supra, is to be similarly viewed. *In re Rawson* could hardly be more clear or on point.

Plaintiff claims that this Court should accept certiorari review because the Eleventh Circuit's Opinion permits Defendants to "sandbag an

unsuspecting plaintiff into failing to meet a burden of proof by claiming that burden as Defendants' own and then shrugging it off later." (Cr. Pet. p. 7). Not only is Plaintiff's interpretation of the facts belied by the District Court's findings, Plaintiff offers not one case to support this argument. Plaintiff also argues the Eleventh Circuit "made new law that does not square with the pleading rules nor this Court's insistence upon taking them seriously." (Cr. Pet. p. 9). Again, Plaintiff fails to cite to a single case, nor does she articulate precisely what the "old" law that the Eleventh Circuit purportedly ignores is. There is no basis for this Court's certiorari review.

V. THE ELEVENTH CIRCUIT'S OPINION, THAT THE DISTRICT COURT DID NOT ABUSE ITS "CONSIDERABLE DISCRETION" BY PROHIBITING PLAINTIFF FROM INTRODUCING EVIDENCE ON REBUTTAL WHICH DID NOT "EXPLAIN, REPEL, CONTRAST, NOR DISPROVE" TESTIMONY OFFERED BY DEFENDANTS' WITNESSES, DID NOT VIOLATE THE SEVENTH AMENDMENT.

Plaintiff next argues the Seventh Amendment required the Eleventh Circuit to let her rebut Defendants' Rule 50(a) Motion. (Cr. Pet. p. 10). This is yet another garden variety issue, upon which this Court has traditionally declined to interfere, dressed up as a constitutional violation. Since the Eleventh Circuit merely affirmed the District Court's "considerable discretion" in prohibiting evidence on rebuttal, this Court should decline jurisdiction. *See Wright*, 26 U.S. at 167 (incidental orders "are so

peculiarly addressed to the sound discretion of the Courts of original jurisdiction as to be fit for their decision only"). Plaintiff's argument has even more fundamental flaws, which a summary of the proceedings below reveals.

Plaintiff filed her complaint with the EEOC on September 14, 2001. Consequently, Defendants could only have been held liable for sexual harassment that had occurred on or after September 15, 2000, under the FCRA, *see* §760.11(a), Fla. Stat., and on or after November 19, 2000, under Title VII. (App. 51a) (citing to 42 U.S.C. §2000e-5(e); *City of Hialeah, Fla. v. Rojas*, 311 F.3d 1096, 1101 (11th Cir. 2002)).

The District Court found Defendants had alleged Plaintiff's failure to timely file at Defendants' first opportunity and maintained that position throughout the case, through trial, plainly putting timely filing at issue and placing the burden on Plaintiff. (App. 69a). As set forth above, Plaintiff pled fulfillment of conditions precedent. *Id.* Defendants denied that and responded that "Plaintiff did not exercise her right to sue or to file her EEOC complaint within the time prescribed by the statute." (App. 54a). Defendants also alleged "Plaintiff failed to exhaust all administrative remedies and, thus, cannot obtain relief pursuant to Title VII or the FCRA, Chapter 760"; (App. 54a). Defendants raised an untimeliness argument in a motion to dismiss and in its summary judgment motion (App. 70a). Although Defendants consistently and repeatedly raised untimeliness in

each of the foregoing filings, Plaintiff still fell short, in her case in chief, to put on evidence of timeliness.

After Plaintiff rested her case in chief, Defendants moved *ore tenus* under Rule 50, Fed.R.Civ.P. on the issue of whether any of the events described by Plaintiff or her witnesses occurred within the 365 days prior to the filing of her administrative charge. (App. 71a; 71a n.3). Plaintiff never moved to reopen her direct case to introduce additional evidence on timeliness after resting in her case in chief, which she clearly was permitted to do subject to the District Court's discretion. *See Chevy Chase Dairy v. Mullineaux*, 71 F.2d 985 (C.A. D.C. 1934). The District Court reserved ruling on the motion (App. 72a), and the trial continued with Defendants' presentation of their case. After Defendant rested, Plaintiff made a "partial Rule 50 motion" regarding the timeliness issue. *Id.* Plaintiff contended Defendants had rested "without raising anything in support of its affirmative defense of a lack of activity within the statute of limitations time period." *Id.*

In their Rule 50(a) motions, Defendants maintained it was Plaintiff's burden to prove when the act(s) supporting her battery claim occurred and whether she had "instituted the administrative process in a timely fashion" regarding her Title VII claim. Defendants aptly portrayed Plaintiff's efforts as improperly obliging Defendants to "prove a negative", *i.e.* that none of the alleged events of harassment occurred within the statutory period, when Defendants had, from the inception of the litigation, denied that such acts occurred at all.

Defendants reiterated that Plaintiff had not presented any evidence of events happening within the requisite time period toward the end of her employment. (App. 73a). The District Court reserved ruling on the "statute of limitations argument." *Id.*

In Plaintiff's rebuttal case, her counsel questioned Plaintiff regarding the testimony of a witness, Kelly Oehrle, who had testified during Plaintiff's direct case. *Id.* The District Court then defined the scope of Plaintiff's proper rebuttal to factual matters raised by Defendants in their case in chief. The Court admonished Plaintiff's counsel that the scope of rebuttal was not to rehash Plaintiff's case in chief. (App. 73a, n.4; 74a).

During the charge conference held at the conclusion of the trial testimony, Plaintiff's counsel complained he had wanted to "tighten up the statute of limitations problem in rebuttal" but "was not allowed to because it wasn't responsive to anything that happened in the defense." (App. 74a). This was code for Plaintiff's novel propositions that "rebuttal" means something other than the word's accepted definition and that the evidence needed to prove the matters on which Plaintiff carries the burden of proof could somehow be introduced in part in her case in chief and in part on rebuttal. Any such notion has no support under the law. To the contrary, if a plaintiff could divide the evidence the way Plaintiff suggests, a defendant would not be assured of its ***right*** to respond to prima facie evidence a plaintiff chose to introduce in rebuttal, because the admission of sur-rebuttal evidence is

discretionary. *See Cason-Merenda v. Detroit Medical Center*, 2010 WL 1286410 (Slip Opinion) (E.D. Mich.) (denying defendant's motion for leave to file a sur-rebuttal expert report).

The District Court concluded it "did not preclude anyone from presenting evidence pertaining to the time that events occurred, and abundant evidence was presented regarding when things happened or did not happen." (App. 76a). Plaintiff acknowledges, as she must, that she did "put on some evidence showing sexual harassment clearly within the stated limitations period. Obviously, the jury did not credit that evidence." (Cr. Pet. p. 10, 11).

Consequently, Plaintiff's Seventh Amendment rights were not violated. She had the burden of proving timeliness in her case in chief. This she did not do. Moreover, Plaintiff was even permitted to, and did, introduce additional timeliness evidence on rebuttal. The District Court ruling was not only within its discretion, but any such ruling caused no harm to Plaintiff. *See United States v. Frazier*, 387 F.3d 1244 (11th Cir. 2004) (*en banc*) (where the substance of the excluded evidence was admitted by other means or the contrary evidence supported the opposing party's position, the district court's evidentiary decision excluding evidence is harmless error).

The Eleventh Circuit ruled the District Court did not abuse its "considerable discretion" limiting Plaintiff's rebuttal case. (App. 55a). "The trial judge has the authority, within limits, to control the scope

of rebuttal testimony." *Id.* (citing to *United States v. Renfro*, 620 F.2d 497, 502 (5th Cir. 1980) (citing *Geders v. United States*, 425 U.S. 80, 86 (1976))). The Eleventh Circuit found Plaintiff presented little testimony during her case in chief concerning when the complained-of behavior occurred. (App. 51a). Her witnesses did not state clearly when any harassing conduct had occurred, or if any had occurred after September 15, 2000. *Id.* Defendants put on no evidence regarding when the events described by Plaintiff's witnesses purportedly occurred. *Id.* The Eleventh Circuit concluded Plaintiff's attempted rebuttal could not "explain, repel, counteract, [n]or disprove" the testimony offered by defense witnesses (App. 56a) (citing to *cf. United States v. Mock*, 523 F.3d 1299, 1303 (11th Cir. 2008) (quoting *Frazier*, *supra* at 1269)); and that there was no evidence to rebut. (App. 56a).

Plaintiff again cites to *Ross* for the proposition that the Seventh Amendment was designed to cure evidentiary deficiencies before cases go to the jury. (Cr. Pet. p. 10). However, as shown above, *Ross* is wholly distinguishable. *Crawford v. Andrew Systems, Inc.*, 39 F.3d 1151, 1153 (11th Cir. 1994) also cited by Plaintiff (Cr. Pet. p. 10) is distinguishable for the even more obvious reason that in *Crawford*, the district court *sua sponte* set aside plaintiff's verdict for insufficient evidence even though defendant never even moved for a directed verdict either prior to the submission of the case to the jury or even after the jury returned a verdict against defendant. *Id.* at 1154. In her appeal, Plaintiff cited to both of these cases. The Eleventh

Circuit discerned no similarity between these cases and the present case.

Plaintiff also complains that one "possibility" for the jury's failure to credit Plaintiff's evidence of timeliness is "there just was not enough of the evidence." (Cr. Pet. p. 11). Plaintiff's wild speculation is not a sound reason to grant the petition. In the end, the District Court did not abuse its "considerable discretion" in its ruling. Plaintiff was not ambushed – she simply made a miscalculation at trial.

Plaintiff claims that her Cross Petition seeks certiorari to seek prevailing party status and, thus, eligibility for fees on the statutory claims. (Cr. Pet. p. 3). Plaintiff inappropriately wheels this point out for a third time. The Court should refuse to consider this stealth point.

First, it consists of an argument wholly manufactured from Plaintiff's imagination.

Second, Sup. Ct. R. 14.1(a) provides in pertinent part: "*Only the questions set out in the petition, or fairly included therein, will be considered by the Court.*" (emphasis added). Sup. Ct. R. 10. Plaintiff has failed to argue entitlement to fees as a separate distinct basis for granting the writ. The only place Plaintiff even addresses this is in an after-thought at the end of Point IV where Plaintiff asserts that "*had* [she] been allowed to add more examples of sexual harassment after September 15, 2000 . . . that *might* have persuaded the judge to eliminate the limitations question from the verdict

form" which would have entitled her to fees. (Cr. Pet. p. 11).

This argument is fundamentally flawed. Again, a summary of the proceedings below puts into context the baseless nature of Plaintiff's argument. The District Court correctly held that the issue of the timeliness of the filing of Plaintiff's administrative charge was plainly a factual matter for the jury. (App. 70a). The Court included the issue of timing in the jury instructions as to both the battery claim and the sexual harassment claims, and the verdict form asked the jury whether events constituting battery and sexual harassment occurred on or after the respective pertinent dates for these claims. (App. 75a). The jury "clearly" found for Defendants on the issue (timely administrative filing) on which Plaintiff bore the burden of proof and for Plaintiff on the issue (battery within the statute of limitations) on which Defendants bore the burden of proof. (App. 70a n.2). The District Court noted that the jury resolved the issue of whether Plaintiff's battery claim was timely in Plaintiff's favor, yet Plaintiff never challenged the submission of the battery statute of limitations issue to the jury. (App. 71a).

The District Court specifically rejected Plaintiff's claim that timeliness issues are never included in the jury instructions and ruled: "where there is an issue whether an act occurred at a certain time so as to render a claim timely under an administrative scheme or a statute of limitations, the issue is one of fact for a jury, and courts instruct juries accordingly." (App. 75a) (citing to *Weaver v.*

African Methodist Episcopal Church, 54 S.W.3d 575, 587 (Mo. Ct. App. 2001) (holding that "the issue of whether the battery occurred more than two years before the date of filing was one of fact for resolution by the jury "under the circumstances of the case); and Fla. Std. Jury Instructions in Civil Cases 3.8(g) and Verdict Form 8.9 (including special interrogatory for jury to determine statute of limitations compliance in medical malpractice cases)).

Consequently, all of the additional evidence in the world would not have made the timeliness issue any less of a question for the jury. This Court should decline jurisdiction over this speculative "comment," (for lack of a better description).

CONCLUSION

For the reasons discussed above, the Cross Petition for a Writ of Certiorari should be denied.

Respectfully submitted on behalf of David Siegel; Central Florida Investments, Inc.; CFI Sales & Marketing, Ltd.; Westgate Resorts, Inc.; Westgate Resorts, Ltd.; Westgate Lakes, Inc.; and Westgate Lakes, Ltd. (collectively "CFI") this 23rd day of August 2010.

Respectfully submitted,

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